

Sup.

THE
ATTORNEY'S VADE MECUM,

AND

CLIENT'S INSTRUCTOR, c†

TREATING OF

A C T I O N S:

(SUCH AS ARE NOW MOST IN USE.)

OF PROSECUTING AND DEFENDING THEM;
OF THE PLEADINGS AND LAW.

ALSO OF

HUE AND CRY.

THE SUBJECTS ARRANGED IN A CLEAR AND
PERSPICUOUS MANNER.

IN THREE VOLUMES.

V O L. II.

TO THE SECOND VOLUME IS ADDED,
AN APPENDIX,

CONTAINING

A FEW PRECEDENTS,
BEING COPIES OF COMPLETE RECORDS.

BY JOHN MORGAN,
OF THE INNER TEMPLE, BARRISTER AT LAW.

DUBLIN:

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FOR E. LYNCH, J. MCCORMACK, J. JONES, J. ELLIS,
AND W. JONES.

M.DCC.XCII.

RECORDED MADE MICHIGAN

INSTRUCTIONS

TRAINING OF

OF THE M. E.

(SEE ALSO HOW MOST IN THE)

OF THE COURT AND DEFENDING THEM.

THE PLEADINGS AND LAW.

AND OF

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OF

HUE AND CRY.

HUE and Cry is, the pursuit of an offender, from town to town, till he is taken; which all who are present, when a felony is committed, or a dangerous wound given, are by the common law, as well as by the statute, bound to raise, against the offenders who escape, on pain of fine and imprisonment. It is the old common law process after felons, and such as have dangerously wounded any person. It may be by a horn, or by the voice. 2 *Inst.* 172.

As the raising of hue and cry is enjoined by the common law, which may be called a raising of it, at the suit of the king, as well as by several acts of parliament, which may be called a raising of it, at the suit of a private person, inasmuch as those statutes make the hundred answerable to the party robbed, if they neglect to pursue the hue and cry, and apprehend the robbers; we shall consider

I. Hue and Cry at the Common Law, or Suit of the King.

And herein,

1. *By whom Hue and Cry is to be levied.*
2. *In what manner it is to be levied.*
3. *In what manner to be pursued.*
4. *What the Persons may justify doing who pursue it.*
5. *How the Omission or Neglect of not doing it is punished.*

II. Of raising Hue and Cry pursuant to the several Statutes, which declare in what Manner the Hundred shall be chargeable.

And herein,

1. *What Kind of Robbery it must be, so as to make the Hundred liable, and how far it is necessary that it be done on the Highway.*
2. *On what Day, or Time of the Day, it must be committed.*
3. *What Hundred shall be said to be liable.*
4. *What Person is to bring the Action, and make Oath of the Robbery.*
5. *Of the Notice to be given of the Robbery.*
6. *Where the Party must give Bond for Payment of Costs, in case he does not prevail.*
7. *Of the Oath to be taken of the Robbery, and before whom the same must be.*
8. *At what time the Action is to be brought.*
9. *What Evidence will maintain it; and therein of the Witnesses for and against it.*
10. *What shall excuse the Hundred, and therein of apprehending the Robbers.*
11. *How the Money is to be levied, and each Hundredor to contribute to the Charges.*

I. Hue and Cry at Common Law, or Suit of the King:

And herein,

1. *By whom Hue and Cry is to be levied.*

It seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorised to levy hue and cry, but is also bound to do it, under pain of fine and imprisonment.

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From hence it follows, that although it is a good course, as Lord *Hale* says, to have a precept or warrant from a justice of peace for raising of hue and cry; yet it is neither of absolute necessity, nor sometimes convenient, for the felons may escape before the justice can be found: hue and cry was part of the law before the statute of 1 *E.* 3. c. 16. which first instituted justices of the peace.

It is incumbent upon constables to pursue hue and cry, when called upon, and they are severely punishable if they neglect it; it prevents many inconveniencies if they be there, for it gives a greater authority to their pursuit, and enables the pursuants, in his assistance, to plead the general issue upon the statutes of 7 *Jac.* 1. c. 5. & 21 *Jac.* 1. c. 12. without being driven to special pleading; and therefore to prevent inconveniencies that may happen by unruliness, it is most adviseable that the constable be called; yet upon a robbery or other felony committed, hue and cry may be raised by the country, in the absence of the constable; and in this there is no inconveniency, for if hue and cry be raised without cause, those that raise it are punishable by fine and imprisonment.

2. *In what Manner it is to be levied.*

The regular method of levying hue and cry is for the party to go to the constable of the next town and declare the fact, describe the offender, the way he is gone, and if he knows it, to tell his name, describe his person, habit, horse, and such other circumstances, as he knows, which may conduce to a discovery: whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon the not finding him, to send the like notice, with the utmost expedition to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and then to the next, till the offender be found.

3. *In what Manner to be pursued.*

The constable is not only to make search in his own vill, but is also to raise all the neighbouring vills, who are all to pursue the hue and cry, with horsemen as well as footmen, until the offender be taken.

4. *What the persons may justify doing, who pursue it.*

For the understanding hereof we shall here insert what my Lord Chief Justice *Hale* apprehends to be the law in this matter.

1. That in case of the hue and cry once raised, and levied, upon supposal of a felony committed, though in truth there was no felony committed; yet those who pursue hue and cry, may arrest and proceed as if a felony had been really committed.

And therefore the justification of an imprisonment by a person upon suspicion, and by a person, especially a constable, upon hue and cry levied, do extremely differ; for in the former there must be a felony averred to be done, and it is issuable; but in the latter, viz. upon hue and cry, it need not be averred, but hue and cry levied upon information of a felony is sufficient, though perchance the information was false; and therefore an averment of a felony committed, in case of a justification of an imprisonment, upon hue and cry, is not necessary; the reasons whereof are, 1. because the constable cannot examine the truth or falsehood of the suggestion of him who first levied it, for he cannot administer him an oath, and if he should forbear his pursuit of the hue and cry, till it be examined by a justice of peace, the felon might escape, and the pursuit would be lost and fruitless. 2. By several acts of parliament he is compellable to pursue hue and cry, and is punishable, as those of the vill, if they do it not. 3. Because he that raiseth a hue and cry where no felony is committed, viz. the person that giveth the false information, is severely punishable by fine and imprisonment, if the information be false; and therefore if he raise the hue and cry upon a person that is innocent, yet they that pursue the hue and cry may justify the imprisonment of that innocent person, and the raiser is punishable; and by the same reason, if he give notice of a felony committed when there was in truth none.

2. If hue and cry be raised against a person certain for felony, though possibly he is innocent, yet the constables, and those that follow the hue and cry, may arrest and imprison him in the common gaol or carry him to a justice of peace.

3. If the person pursued by hue and cry be in a house, and the doors are shut, and refused to be open upon demand of the constable, and notice given of his business, he may break open the doors, and this he may do in any case where

where he may arrest, though it be only a suspicion of felony, for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case; and the same law is upon a dangerous wound given, and a hue and cry levied upon the offender.

And it seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable: but men ought to be very cautious how they proceed to such extremities.

4. Upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places, within his vill, for the apprehending of the felons.

But though he may search suspected places or houses, yet his entry must be by the open door, for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied, be there; and then it is true he may; therefore in case of such a search, the breaking open the door is at his peril, *viz.* justifiable if he be there; but it must be always remembered, that in case of breaking open a door, there must first be a notice given to those within of his business, and a demand of entrance, and a refusal, before the doors can be broken.

5. If the hue and cry be not against a person certain, but by description of his stature, person, clothes, horse, &c. the hue and cry doth justify the constable, or other person following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant; it is a kind of process that the law allows, (not usual in other cases) *viz.* to arrest a person by description.

6. But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact, is neither known, nor describable by person, clothes, or the like; yet such a hue and cry is good, as hath been said, and must be pursued, though no person certain be named or described.

And therefore in this case, all that can be done is, for those who pursue the hue and cry, to take such persons as they have probable cause to suspect, as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, &c.

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And here the justification of the imprisonment is mixed, partly upon the hue and cry, and partly upon their own suspicion; and therefore, 1. in respect that it is upon hue and cry at the common law, there need no averment that the felony was done; yet it was requisite to aver that an information was given that the felony was done, if the arrest was by that constable that first received the information, and so raised the hue and cry; and if the arrest was made by that constable, or those vills to whom the hue and cry came, at the second-hand, it was requisite to aver that such an hue and cry came to them, purporting such a felony to have been committed; but, 2^{dly}, in as much as the hue and cry, neither names nor describes the person of the felon, but only the felony committed; and therefore the arrest of this or that particular person, and so applied, is left to the suspicion and discretion of the constable, or the people of the second or third vill; at the common law he that arrested any person upon such general hue and cry, was to aver that he suspected, and shew a *reasonable cause* of suspicion.

But now by the statute of 7 Jac. 1. c. 5. the constable, or any that come to his assistance, even in this case of hue and cry, may plead the general issue, and give the whole matter of the justification in evidence; for the pursuit of hue and cry, though performed by others, as well as the constable, is principally the act of the constable of the vill, and the others are but his deputies or assistants, within the precincts of his constablewick. I conceive on the trial the defendants must prove, what at the common law was necessary to be averred, in a special justification.

5. *How the Omission or Neglect of not doing it, is punished.*

There can be no doubt but that both by the common law, as also by the several statutes which enjoin the levying of hue and cry, they who neglect to levy one, (whether officers of justice, or others) or who neglect to pursue it, when rightly levied, are punishable by indictment, and may be fined and imprisoned for such neglect.

And now by the 8 Geo. 2. c. 16. it is enacted, " That every constable of the hundred, and every constable, borsholder, head-borough, or tything man of any town, parish, village, hamlet, or tything, within the hundred, or the franchises within the precinct thereof, wherein the robbery shall happen, as soon as the same shall come to his knowledge,

ledge, either by notice from the party or parties robbed, or from any other person or persons, to whom notice shall be given thereof, pursuant to this or any other statute, shall, with the utmost expedition, make and cause to be made, fresh suit and hue and cry, after the felon or felons, by whom such robbery shall be committed, and if any constable, borsholder, head-borough, or tything man, shall offend, in the premises, by refusing, or neglecting to make, or cause to be made, such fresh suit, and hue and cry, every such offender shall, for every such refusal or neglect, forfeit 5*l*.

II. Of raising Hue and Cry, pursuant to the several Statutes which declare in what Manner the Hundred shall be chargeable for Robberies.

The levying for hue and cry is, as hath been already observed, enjoined by several acts of parliament, and to this purpose it is enacted by *Westminster*, 1, c. 9. "That all be ready and apparelled at the summons of the sheriff, and a *cry de pais*, to pursue and arrest felons, as well within franchises as without; and if they do it not, and be thereof attainted, *le roy prendra a eux grevement*, they are to be indicted and fined for the neglect." Though some imagined that hue and cry was grounded on this statute, yet my Lord Coke says that it was used long before, and appears even by this statute, which, instead of introducing a new law, enforces obedience to that which was founded on the antient laws of the realm, 2 *Inst.* 171.

By the statute of 4 *E. 1. de officio coronatoris*, "hue and cry shall be levied for all murders, burglaries, men slain, or in peril to be slain, as other where is used in *England*, and all shall follow the hue and steps as near as they can; and he that doth not, and is convicted thereof, shall be attached to be before the justices in eyre."

By the statute of *Winton*, or 13 *Edw. 1. St. 2. c. 1*, it is enacted, "That from thenceforth every country shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from country to country." And c. 2. of the same statute, "if the country will not answer for the bodies of such manner of offenders, the pain shall be such, that every country, that is, to wit, the people dwelling in the country, shall be answerable for the robberies done, and also the damages; so that the whole hundred where the robbery shall be done, with
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franchises being within the precinct of the same hundred, shall be answerable for the robberies done: and if the robbery be done within the division of two hundreds, both the hundreds, and the franchises within them, shall be answerable: and after that the felony or robbery is done, the country shall have no longer space than forty days *, within which forty days it shall behove them to agree, for the robbery or offence, or else that they will answer for the bodies of the offenders.

The statute of *Winton* gives the action against the hundred, but by subsequent statutes, such as 27 *Eliz. c. 13.* & 8 *Geo. 2. c. 16.* several alterations and additions have been made therein, which we shall consider under the following heads:

1. *What Kind of Robbery it must be, so as to make the Hundred liable, and how far it is necessary that it be committed on the Highway.*

It seems to be admitted, that no kind of robbery will make the hundred liable, but that which is done openly, and with force and violence; and therefore the private stealing or taking any thing from the party, does not come within the statutes which make the hundred liable, for the hundred is not liable, because they did not prevent the robbery, but because they did not apprehend the robbers, which in private felonies, and of which they had no notice, it would be difficult, if not impossible for them to do.

It hath likewise been adjudged, and is admitted in all the books which speak of this matter, that a robbery in a house, whether it be by day or by night, does not make the hundred liable; the reasons whereof are, that every man's house is in law esteemed his castle, which he himself is obliged to defend, and into which no man can enter, to see what is doing there, without his leave; besides, being done in a house, the inhabitants of the hundred cannot be presumed to have notice of it, so as to be able to apprehend the offenders.

But if a person be assaulted in the highway, and carried into a house, and there robbed, it *seems* the hundred shall be liable, for otherwise the provision made by the statute would be eluded.

* Vide the Parliament roll, and 3 *Lev.* 320.

It does not seem necessary that the robbery should be committed in the highway, nor alledged to have been so, by the plaintiff in his declaration. It may be in a private way, may be in a coppice, and in both cases the hundred shall be chargeable. 2 *Salk.* 614. *pl.* 4.

Therefore, where, upon the statute of hue and cry, the plaintiff declared that certain persons unknown, &c. at a certain place on the Southern part of a certain gate, called *Fair-mile Gate*, within the parish, &c. with force and arms assaulted him, and robbed him of so much money, and there being a verdict for the plaintiff, it was moved in arrest, that at a certain place, might be meant a robbery committed in a house, garden, or wood, for which the hundred is not liable, being only obliged to guard the highways: but it was held that the declaration was good, especially after verdict, because it must be intended that this was given in evidence, otherwise the plaintiff would have been nonsuited: the court also held, that without the help of a verdict, this declaration had been good, and that it was not necessary for the plaintiff to alledge, that the robbery was committed on the highway, more than that it was committed by day, and not by night, and that all the antient precedents were accordingly.

2. *On what Day, or Time of the Day it must be committed.*

It hath been resolved by three judges against one, that robbery on the sabbath day should charge the hundred, and that the pursuing of robbers who violate the sabbath, was so far from being a profanation of the day, that it was a work of charity and justice; also that several persons, such as physicians, chirurgeons, midwives, &c. were necessitated to travel on that day, and it was but reasonable that they should be protected in their journey.

But now by the 29 *C. 2. c. 7. par. 5.* it is enacted, "That, if any person or persons whatsoever, which shall * travel upon the Lord's day, shall be then robbed, that no hundred, or the inhabitants thereof, shall be charged with, or answerable for, any robbery so committed; but the person or persons so robbed shall be barred from bringing any action for the said robbery, any law to the contrary notwithstanding; nevertheless the inhabitants of the counties and

* This *statute* does not seem to extend to persons in the country riding or going to church, nor to physicians, chirurgeons, &c. who are under a necessity of travelling on this day. *Str.* 406. *Comyns* 345. *pl.* 175.

hundreds, (after notice of any such robbery to them or some of them given, or after hue and cry for the same to be brought) shall make or cause to be made fresh suit and pursuit after the offenders, with horsemen and footmen, as by the 27 *Eliz. c. 13.* is provided, upon pain of forfeiting to the king's majesty, his heirs and successors, as much money as might have been recovered against the hundred by the party robbed, if this law had not been made."

It is clearly agreed, that for a robbery committed in the night, the hundred is not chargeable, because they cannot be presumed to have notice thereof, so as to be able to apprehend the robbers. 7 *Co. 6. b. 2 Inst.* 659.

But yet it is not necessary that the robbery should be committed after sunrise, and before sunset; therefore if there be as much day light at the time, as that a man's countenance may be discerned thereby, though it be before sunrise or after sunset, the hundred shall be liable. 7 *Co. 6. a.*

It is not necessary for the plaintiff to alledge in his declaration, that the robbery was committed in the day-time, and not in the night. But it seems, that if upon the evidence it turns out to have been committed in the night, he cannot have a verdict.

It hath been also held, that if robbers drive, or oblige a waggoner to drive his waggon from the highway by day, but do not rob or take any thing till night, yet that this is a robbery in the day-time, so as to charge the hundred.

.3. *What Hundred shall be said to be liable.*

By the statute of *Winton* it is enacted, " That if the robbery be done within the division of two hundreds, both the hundreds and the franchises within them, shall be answerable."

If robbers assault a person with an intent to rob him in one hundred, and he escapes and flies into another, whither he is pursued by the robbers, and there robbed, the last hundred shall be liable.

So where by special verdict it was found, that the plaintiff was travelling in the highway in the hundred of *A.* where he was set upon, and carried into the hundred of *B.* and robbed in a coppice, in the highway of this hundred; it was adjudged that the hundred of *B.* should be liable, for that there the robbery was committed, and not before.

If one be taken in the hundred of *A.* and carried into the hundred of *B.* into a house there, viz. a mansion-house, and robbed,

robbed, or taken in the day-time in *A.* and carried to *B.* and there robbed in the night, it is said that there is no remedy against either hundred; these cases not being provided for by the statute, 2 *Salk.* 615.

By the 27 *Eliz. c. 13. par. 2.* reciting that the inhabitants of hundreds do not prosecute the hue and cry brought to them, because those hundreds only are liable in which the robberies have been committed, it is enacted, "That the inhabitants and residents of every or any such hundred, (with the franchises within the precinct thereof) wherein negligence, fault or defect of pursuit, and fresh suit after hue and cry made, shall happen to be, shall answer and satisfy the one moiety, or half of all and every such sum or sums of money and damages as shall be recovered, or had against, or of the said hundred, with the franchises therein, in which any robbery or felony shall be committed or done, recoverable by action of debt, bill, plaint, or information, in any of the Queen's courts of record at *Westminster*, by and in the name of the clerk of the peace for the time being, of or in every such county, where any such robbery and recovery by the party or parties robbed shall be, without naming the Christian name or surname of the said clerk of the peace; which moiety so recovered shall be to the only use and behoof of the inhabitants of the said hundred, where any such robbery or felony shall be committed or done."

4. *What Person is to bring the Action, and make Oath of the Robbery.*

If a servant be robbed in the absence of his master, of his master's money, it is clear that the master may maintain an action for it against the hundred; but then the servant must make oath that he knew not any of the robbers. The master or servant may bring the action, but the oath must be by the servant, when robbed in the absence of his master, *Cro. Eliz.* 142. *Green's Case* adjudged. *Leon.* 323. *S. C.* adjudged. For the statute of 27 *Eliz. c. 13.* which requires, that the party robbed shall make oath within twenty days next before the action brought, that he knew not the robbers, &c. was made, 1st, That the person robbed should enter into a recognizance to prosecute the robbers, if he knew them, or any of them. 2dly, That the hundred might be excused upon the conviction of such person or persons. 3dly, To prevent a robbery by fraud. 3 *Mod.* 288.
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For if the robbery be by combination, the party cannot recover, *Show. 94. Carth. 145. Holt, 460. pl. 1.*

A servant or a carrier being robbed in the master's, or owner's absence, may maintain an action against the hundred, and may declare that he was possessed as of his own proper goods; and though the jury find that he was robbed of a master's or owner's money, yet he shall recover, for he possessed as of his own proper goods, against all, and in respect of all, but him that hath the very right.

The servant, being robbed, may bring an action against the hundred; and though the jury find that part of the things belonged to the master, and part to the servant, yet shall he recover for the whole.

If a servant be robbed in the presence of the master, the master must sue, and the oath of the master is sufficient.

One *Jones*, and his wife and servant, travelling together, were all robbed of his money; and *Jones* alone brought the action for the whole money, against the hundred, as well for what was taken from his wife and servant, as from his own person; and he alone, without his wife or servant, made oath of the robbery: all which matter being found on a special verdict, it was adjudged that his oath alone was sufficient, within the intent of the statute; and although it was further found, that the servant of *Jones*, who was robbed with his master, knew one of the robbers, whose name was *Lenoe*, yet *Jones* had his judgment.

So, where one *Bird*, a laceman of *Colliton* in *Devonshire*, in coming to *London* with his servant, left the usual great road between *Brentford* and *Hammer-smith*, and rode through a bye lane near serjeant *Maynard's* house to avoid the dust; and in that lane the servant was robbed, in the presence of his master, of a box of lace, which was behind him on the back of the horse, to the value of 1200l.; and *Bird*, the master alone, made oath of the robbery, and brought the action; and, by the opinion of the Chief Justice *Holt*, the oath of the master was sufficient, because, being present, the goods were in his possession; for the possession of the servant in the presence of his master, is the master's possession, and in this case *Bird* recovered 1000l. and had execution.

If *A.* and *B.* travelling together are robbed of a sum of money, to which they are both jointly intitled, they may both join in an action against the hundred; *secus* if they had separate and distinct interests.

5. *Of the Notice to be given of the Robbery.*

By the 27 of *Eliz. c. 13. par. 11.* it is enacted, "That no person or persons, that shall happen to be robbed, shall have or maintain any action, or take any benefit of the statutes which made the hundred liable, except the same person and persons so robbed shall, with as much convenient speed as may be, give notice and intelligence of the felony, or robbery, unto some of the inhabitants of some town, village, or hamlet, near unto the place where any such robbery shall be committed."

In the construction of this clause of the statute, it hath been holden, that if a person be robbed in the highway in the division of the hundreds, he need not give notice to the inhabitants of each hundred, but notice to either of them is sufficient.

That alledging notice to be given at a village, near to where the robbery was committed, is sufficient, though such village happen to be in a different county; for strangers are not obliged to take notice of the division of counties.

That though it be the best course to alledge, that notice was given at the place where the robbery was committed, or at some village near the place; yet that notice near the hundred, or near the division of the hundred where the robbery was committed, is sufficient; and that this shall not be intended, the most remote part of the hundred, especially after a verdict.

If several persons are in company at the time of the robbery, it is said that notice given by any one of them is sufficient. *Show. 74.*

It hath been resolved, that though the notice given be five miles from the place where the robbery was committed, that it is sufficient. The reason whereof is, because that the party who is a stranger to the country, cannot have conuizance of the nearest place or town. *March. 11.*

Also, if the party robbed give notice with as much convenient speed as may be, though he be otherwise remiss in not pursuing the robbers, or refuses to lend his horse for that purpose, yet he shall not lose his action for this, nor the hundred be excused.

And now, by 8 *Geo. 2. c. 16.* it is further enacted, "That no person shall maintain any action against any hundred or take any benefit by virtue of the statutes of *Winton*, or 27 *Eliz. c. 13.* or either of them, unless he, she, or they, shall,
over

over and besides the notice already required by the last of the above mentioned statutes to be given of any robbery, with as much convenient speed as may be, after any robbery committed, give notice thereof to one of the constables of the hundred, or to some constable, borsh-holder, head-borough, or tything man, of some town, parish, village, hamlet, or tything, near unto the place wherein such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling-house of such constable, &c. describing in such notice, so far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of the robbery; and also shall, within the space of twenty days next after the robbery committed, cause public notice to be given thereof in the *London Gazette*, therein likewise describing, so far as the nature and circumstances of the case will admit, the felon or felons, and the time and place of such robbery, together with the goods and effects, whereof he, she, or they, was or were robbed."

6. *Where the Party must give Bond for Payment of Costs, in case he does not prevail.*

To this purpose by the 8 G. 2. c. 16. it is enacted, "That before any action commenced, the party shall go before the chief clerk, or secondary, or the filazer of the county wherein such robbery shall happen, or the clerk of the pleas of that court, wherein such action is intended to be brought, or their respective deputies, or before the sheriff of the county wherein the robbery shall happen, and enter into a bond to the high constable, or high constables of the hundred in which the robbery shall be committed, in the penal sum of 100l. with two sufficient sureties to be approved of by such chief clerk, secondary, filazer or clerk of the pleas, or their respective deputies, or the sheriff of the said county, with condition for securing to such high constable or high constables (who are hereby empowered and required to enter, or cause to be entered an appearance, and also to defend such action,) the due payment of his or their costs, after the same shall be taxed by the proper officer, in case that he, she, or they (the plaintiff or plaintiffs in such action) shall happen to be nonsuited, or shall discontinue his, her or their action, or in case judgment shall be given against such plaintiff or plaintiffs on demurrer, or that a verdict shall be given against him, her, or them."

And

And it is further enacted by the said statute, “ that when any such bond as above-mentioned, shall be entered into before the said sheriff, such sheriff shall immediately certify the same in writing, to the chief clerk, or secondary in the court of King’s Bench, or his or their deputies, or to the filazer of that county, wherein such robbery shall be committed, or his deputy, in case the action be intended to be brought in the court of Common Pleas; or if in the court of Exchequer, to the clerk of the pleas, or his deputy; which certificate shall be delivered by the party or parties robbed, to the said chief clerk or secondary, or his or their deputy, or to such filazer, or his deputy, before any process shall issue for the commencement of such suit as aforesaid; and such chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, or the said sheriff, shall not take any greater fee or reward for making such bond, than five shillings, over and above the stamp duties; nor shall any sheriff take any greater fee or reward for making, nor shall any such chief clerk, secondary, filazer or clerk of the pleas, or their respective deputies, take any greater fee or reward for receiving and filing such certificate, than two shillings and sixpence, and such chief clerk, secondary, filazer, or clerk of the pleas, or their respective deputies, and sheriff as aforesaid, are required to deliver over *gratis* (upon reasonable request made for that purpose) all and every such bonds, to be by them respectively taken, pursuant to the act, to the high constable, or high constables, to whose use the same shall be taken.”

7. *Of the Oath to be taken of the Robbery, and before whom the same must be.*

By the 27 *Eliz. c. 13. par. 11.* it is enacted, “ That the party robbed shall not have any action, except he or they shall first, within twenty days next before such action to be brought, be examined upon his or their corporal oath, to be taken before some justice of the peace of the county where the robbery was committed, or near unto the same, whether he or they do know the parties that committed the said robbery, or any of them; and if, upon examination, it be confessed, that he or they do know the parties that committed the said robbery, or any of them, that then he or they so confessing shall, before the said action be commenced or brought, enter into sufficient bond by recognizance before the said justice, before whom the said examination is had, effectually

effectually to prosecute the same person, or persons, so known to have committed the said robbery, by indictment or otherwise, according to the due course of the laws of this realm."

In the construction of this clause of the statute, the following points have been holden.

That if the party does not know the robbers at the time of the robbery committed, though he happens to know them afterwards, it is not material.

It was holden by three judges against one, that the party's swearing that he did not know the robbers, without adding, nor any of them, is not sufficient, because not pursuant to the statute, and because on such equivocal oath, the party cannot be punished for perjury.

It hath been adjudged, that the oath may be taken before a justice of the county, though not in the county at the time of administering it, as where a robbery was committed in *Berks*, and a justice of that county residing in *London*, the party was sworn before him, according to the statute, in *London*, and it was held sufficient, for the justice acts only as a ministerial officer, and as appointed by the statute, and not in a judicial capacity, as a justice of the peace.

If in an action on the statute of Hue and Cry, it be alledged, that the oath was taken before a justice of peace of *Yorkshire*; this will be sufficient, although objected, that there is no such justice, because that in every riding, they have several commissions.

8. *At what Time the Action is to be brought.*

By the 27 *Eliz. c. 13. par. 9.* it is enacted, "That no person or persons robbed, shall take advantage of the statutes, to charge any hundred where any such robbery shall be committed, except he or they so robbed shall commence his or their suit or action, within * one year next after such robbery committed."

In the construction whereof it hath been holden, That if a person be robbed the 9th of *October, 13 Jac.* and so laid, and the teste of the writ, be the 9th of *October, 14 Jac.* that this is not pursuant to the statute; and that in this action, which is penal against the hundred, there is no reason to ex-

* By 8 *G. 2. c. 16. § 14.* No action can be brought but within six months.

clude the day on which the fact was done, nor to make such construction as is done in protections, and the enrolment of deeds, which have always received a benign interpretation.

In an action on the statute of Hue and Cry, the plaintiff made oath according to the statute, and within twenty days brought a writ; and because it was vicious, let it fall; and after the twenty days took out a new one, without making any oath anew, or entering any continuances between the first writ and that: and the court held clearly, that the second writ was not brought according to the statute; for they said, that by these means provision in the statute would be to no manner of purpose.

An action was brought by the master on the statute of *Winton*, for a robbery committed on his servant, in which he declared of an assault and battery done to himself, (tho' then fifty miles from the place); also that he made oath that he did not know any of the persons: the issue was entered of record, and the jury appeared at the bar ready to try it; but being for other business adjourned to another day, the plaintiff observing his mistake, moved to amend, by declaring of a robbery on his servant, &c.; and it appearing that the year in which the action must be brought was expired, and consequently the action must be lost, if not allowed; the court, after long debate and consideration of former precedents, admitted him to amend. The robbery was the gift of the action.

9. *What Evidence will maintain the Action; and of the Witnesses for and against it.*

It seems, that, from the necessity of the case, the party himself that was robbed, is to be admitted as a witness; but then his testimony must be corroborated by collateral proof and circumstances, and such as may induce a jury to believe that a robbery was actually committed, and that the party lost what he declared for.

It was held, that in an action against the hundred, no inhabitant of the hundred could be a witness, because he was concerned in interest.

But now by the 8 G. 2. c. 16. reciting, that by the laws then in being, the person or persons robbed may be admitted, in any action to be brought against the hundred, as a witness to prove the robbery, and the money, goods, or effects, whereof he, she or they, was or were robbed; and yet no person inhabiting within the said hundred, can be admitted

as a witness, for, or on behalf of the said hundred, by reason of the interest he or she may have, in the consequences of the said action, which is commonly very considerable; therefore it is enacted, "That in any action against any hundred, any person inhabiting within the said hundred, or any franchise thereof, shall be admitted as witness, for or on behalf of the said hundred, in the same manner as if he or she were not an inhabitant thereof, but resided in any other hundred whatsoever."

10. *What shall excuse the Hundred; and of apprehending the Robbers.*

By the statutes of *Winton* 13 E. 1. c. 1. and 28 E. c. 11. the robbers must be taken within forty days after the robbery committed, also by the said laws, it was necessary that all the robbers should be taken to excuse the hundred.

But now as to this latter matter, by the 27 *Eliz. c. 13. par. 8.* it is enacted, "That where any robbery is or shall be committed by two or a greater number of malefactors, and that it happen any one of the said offenders be apprehended by pursuit, to be made according to the said former mentioned laws and statutes, or according to this act, that then no hundred or franchise shall in any wise incur or fall into the penalty, loss or forfeiture mentioned either in this, or in any of the former statutes, although the residue of the malefactors shall happen to escape, and not be apprehended.

If a robbery be committed, and hue and cry made, and afterwards, within the forty days, an inhabitant of the hundred finds one of the robbers in the presence of a justice of the peace, who charges him with the robbery, and the justice promises that he shall appear and be forthcoming, this is a taking within the statute; for being in the presence of the justice, it must be understood that he was in his custody and power, and therefore not necessary to lay hold on him.

If hue and cry be made towards one part of the county, and an inhabitant of the hundred apprehends one of the robbers within another, this is a taking within the statute.

By the 8 G. 2. c. 16. it is enacted, "That no hundred or franchise therein, shall be chargeable, by virtue of any of the statutes, if any one or more of the felons by whom such robbery shall be committed, be apprehended within the space of forty days, next after public notice given in the *London Gazette*, as by the statute is provided." But this must be pleaded, and not given in evidence on the general issue.

By

By the same statute 8 G. 2. to the intent that hue and cry may be made with more diligence and effect, and other persons encouraged to take such felon or felons, it is enacted, "That any person or persons who shall apprehend such felon or felons, within the time herein before limited for that purpose, whereby the hundred hath been actually indemnified or discharged, from any such action as aforesaid, shall upon due proof thereof, upon oath made before two justices of the peace (which oath the said justices are hereby also empowered and required to administer,) be entitled to the reward of 10l. which sum shall be raised upon the hundred by a taxation and assessment, to be made and to be levied and collected in the same manner, as the other sums of money, by this act appointed to be raised upon the hundred, are directed to be assessed, levied and collected; and such sum of 10l. which shall be so rated, assessed, levied, and collected as aforesaid, shall be paid unto such two justices of the peace, within ten days next after the same shall be so levied and collected, to the use of the person or persons who shall be thereunto entitled, as a reward for having so apprehended such felon or felons as aforesaid, and such justices shall, upon reasonable request made for that purpose, pay over and deliver the said sum to such person or persons accordingly, in such shares and proportions as the said justices shall think reasonable; provided always that such person or persons, so entitled to such reward, shall not thereby be rendered incapable to be a witness in any such action."

11. *How the Money is to be levied, and each Hundredor, to contribute to the Charges.*

By the 27 Eliz. c. 13. par. 4. reciting, that although the whole hundred where robberies and felonies are committed with the liberties within the precinct thereof, are charged by the former statutes, with the answering to the party robbed, his damages; yet nevertheless the recovery and execution, by and for the party or parties robbed, is had against one, or a very few persons of the said inhabitants, and he and they so charged, have not heretofore had any means, or ways, to have any contribution, of or from the residue of the said hundred, where the said robbery is committed, to the great impoverishment of them, against whom such recovery or execution is had.

By par. 5. of the statute it is enacted, "That after execution of damages by the party or parties so robbed had, it shall

and may be lawful, upon complaint made by the party or parties so charged, to and for two justices of the peace (whereof one to be of the *quorum*) of the same county, inhabiting within the said hundred, or near unto the same, where any such execution shall be had, to assess and tax rateably and proportionably, according to their discretions, all and every the towns, parishes, villages, and hamlets, as well of the said hundred, where any such robbery shall be committed, as of the liberties, within the said hundred, to, and towards an equal contribution, to be had and made for the relief of the inhabitant or inhabitants, against whom the party or parties robbed, before that time, had his or their execution; and that after such taxation made, the constables or constable, headboroughs or headborough, of every such town, parish, village, and hamlet, shall have full power and authority, within their several limits, rateably, and proportionably, to tax and assess, according to their abilities, every inhabitant and dweller, in every such town, parish, village, and hamlet, for, and towards the payment of such taxation and assessment, as shall be so made upon every such town, parish, village, and hamlet, as aforesaid by the said justices; and that if any inhabitant, of any such town, parish, village, and hamlet, shall obstinately refuse and deny to pay the said taxation and assessment, so by the said constables, or constable, headboroughs or headborough, taxed and assessed, that then it shall and may be lawful, to and for the said constables, and headboroughs, and every of them, within their several limits, and jurisdictions, to distrain all and every person and persons, so refusing and denying, by his, and their goods and chattels, and the same distress to sell, and the money thereof coming to retain to the use aforesaid; and if the goods and chattels so distrained and sold, shall be of more value, than the said taxation shall come unto, that then the residue of the said money, over and above the said taxation, shall be delivered unto the said person or persons so distrained.

And it is further enacted by *par. 6.* "That all and every the said constables and headboroughs, after that they have, within their severall limits, and jurisdictions, levied and collected their said rates, and sums of money so taxed, shall within ten days after such collection, pay and deliver the same over unto the said justices of peace, or one of them, to the use and behoof of the said inhabitant or inhabitants, for whom such rate, taxation, and assessment shall be had, or made, as aforesaid; which money so paid, shall by the justices or justice so receiving the same, be delivered over, (upon request made,) unto the said inha-

inhabitant or inhabitants, to whose use the same was collected."

And it is further enacted by *par. 7.* "That the like taxation, assessment, levying by distress, and payment, as aforesaid, shall be had and done, within every hundred where default or negligence of pursuit, and fresh suit, shall be; for, and to the benefit of all and every inhabitant or inhabitants, of the same hundred where such default shall be, that shall at any time hereafter, by virtue of this act, have any damages, or money levied of them, for, or to the payment of the one moiety or half the money, recovered against the said hundred, where any robbery shall be committed."

It hath been adjudged that a person occupying lands, in an hundred, although he hath no house, nor dwelling there, is an inhabitant, within the meaning of the statute, for that otherwise, the statute might be eluded. It is said that a person, though not an inhabitant at the time of the robbery committed, but becoming one before the judgment, shall contribute to the charges. *Sed qu. de hoc. Vide 2 Saund. 423. March 11. Hutt. 125.*

And now for the more equal rating and levying the money for which the hundreds are chargeable by the 8 *Geo. 2. c. 10.* it is enacted, "That no process for appearance in any action to be brought upon the said statutes, or either of them, against any hundred, shall be served on any inhabitant thereof, save only upon the high constable or high constables of the hundred wherein the robbery shall happen, who is and are hereby required to cause public notice thereof to be given, in one of the principal market towns, within such hundred, on the next market-day, after he or they shall be served with such process; or if there shall happen to be no market-town within such hundred, then in some parish church within the hundred, immediately after divine service, on the Sunday next after his or their being served with such process. And he or they is and are also impowered and required to enter, or cause to be entered an appearance, in the said action, and also to defend the same, for and on behalf of the inhabitants of the said hundred, as he or they shall be advised; and in case the plaintiff or plaintiffs in such action, shall recover and obtain judgment therein, that then no process of execution shall be served on any particular inhabitant or inhabitants of the said hundred, or any franchise within the precincts thereof, nor on the said high constable or high constables, but the sheriff or his officer shall, upon the receipt of any writ or writs of execution to him directed, in pursuance of the

the said judgment, instead of serving the said writ or writs on any inhabitant or inhabitants, cause the same to be produced and shewn *gratis*, unto two justices of the peace of the county, riding, or division, whereof one to be of the *quorum*, and residing within the said hundred, or near unto the same, who shall thereupon with all convenient speed, cause such taxation and assessment to be made and to be levied and collected, in such manner as is prescribed in and by the statute 27 *Eliz. c. 13.* in which taxation and assessment, there shall be provided for, and included over and above what the costs, and damages recovered by the plaintiff or plaintiffs, in such action, shall amount to, all such just and necessary expences, which any high constable or high constables of any hundred hath or have been, or shall be at, in having defended any such action as aforesaid, claim being made thereto by such high constable or high constables, before the said justices, upon due notice being given to him or them, by the said justices, for that purpose. And the sums of money, so to be levied, and collected, shall be paid over, and delivered (by such officer or officers as by the said statute 27 *Eliz. c. 13.* are to levy and collect the same,) within ten days after such collection, to the sheriff of the county, wherein the robbery shall happen, to the use and behoof of the plaintiff or plaintiffs, in such action, for so much as the costs and damages, by him, her or them recovered, shall amount to; and to the use and behoof of the said high constable or high constables, for so much as his or their expences, in defending the said action, shall amount to; of which the said high constable or high constables shall give in an account and make due proof, upon oath, to the satisfaction of the said justices, before any such taxation and assessment shall be made, for the reimbursing such high constable or high constables, which oath the said justices are hereby impowered, and required to administer, and shall in such expences have no further allowance, towards paying an attorney to defend the said action, than what such attorney's bill shall be taxed at, by the proper officer of that court, where such action shall be brought, which the said high constable or high constables shall cause to be taxed for that purpose."

And it is further enacted by this statute, "That the sum or sums of money, which shall be paid over, and delivered to the sheriff of the county, shall, upon reasonable request made, be by him paid, and delivered over to the several parties, who shall be intitled to receive the same, without any deduction, fee, or reward, whatsoever.

And that sufficient time may not be wanting for such taxation and assessment to be duly made, and for the money to be

be collected and levied thereupon, after such writ or writs of execution, shall be shewn to such justices, and before the sheriff shall be obliged to make a return thereof, it is enacted, " That no sheriff shall be called upon, or required to make any return to any such writ or writs of execution, as shall issue, or be made out, upon any judgment, which shall be recovered in any action brought against any hundred, by virtue of the above mentioned statutes, or either of them, until after the expiration of sixty days, next after the day, whereupon such writ or writs shall be delivered to the said sheriff, who is required to indorse on the back thereof, the day on which he received the same.

Then the *stat.* recites, that it is reasonable that the said high constable or high constables should be indemnified, as to all charges, which he or they shall necessarily expend, in defending any suit, in pursuance of this act, and that provision should be made, for reimbursing him or them, not only of such expences, as shall be over and above the taxed costs, to be paid by the plaintiff or plaintiffs, in case of a nonsuit, discontinuance, or judgment on demurrer, against him, her, or them, or verdict for the defendants as aforesaid, but even such taxed costs also; in case the plaintiff or plaintiffs, and his, her, or their sureties, who shall be bound for the payment thereof, shall happen to become insolvent, it therefore enacts, " That if any plaintiff or plaintiffs, in an action to be brought against any hundred, shall be nonsuited, or shall discontinue his, her, or their action, or shall have a judgment on demurrer given, or a verdict pass against him, her, or them, it shall and may be lawful for any two justices of the peace, such as therein before mentioned, upon complaint to them made for that purpose, and upon an account given in by such high constable or high constables, and proof made upon oath, to the satisfaction of the said justices, of such expences, necessarily laid out as aforesaid (which oath the said justices are impowered and required to administer) to make, and cause such taxation and assessment to be made, and to be levied and collected, in such manner, as is directed in and by the abovementioned statute of 27 *Eliz. c. 13.* in order thereby to reimburse such high constable or high constables, all such charges, as he or they shall have necessarily expended in defending such action, wherein such plaintiff or plaintiffs shall have been nonsuited, or shall have discontinued his, her, or their action, or against whom judgment shall have been given, upon demurrer, or a verdict shall have been given, over and above the costs, in those cases to be
taxed

taxed as aforesaid; and in case it shall be made appear upon oath, to the said justices of the peace, (which oath the said justices are also impowered and required to administer,) to their satisfaction, that such plaintiff or plaintiffs, and also his or their sureties is and are insolvent, so that the said high constable or high constables can have no relief, as to such taxed costs by them expended, in such defence as aforesaid, save only by the power therein after given to the said justices, it shall and may be lawful, to and for such two justices of the peace to make, and cause a taxation and assessment to be made, and to be levied, and collected in the same manner, as is directed in and by the aforesaid statute made 27 *Eliz. c. 13.* in order thereby to reimburse such high constable or high constables such taxed costs, as by reason of such insolvency, he or they shall not be able to recover, and receive of and from the plaintiff or plaintiffs, in the action, or his or their sureties as aforesaid."

And it is further enacted, "That the several sum or sums of money, which shall be so rated and assessed, and levied and collected as aforesaid, for the reimbursement of the expenses necessarily sustained by any high constable or high constables, in defence of any action brought against the hundred, upon the statutes above mentioned, or either of them, in case of any judgment given against the plaintiff or plaintiffs, shall be paid within ten days after such collection, unto the said justices, or one of them, to the use and behoof of such high constable or high constables, to whom the said justices shall, upon request, pay and deliver over the same."

And it is further enacted, "That the justices of peace, by whom such taxations and assessments, as aforesaid, shall, in pursuance of the said statute, of 27 *Eliz. c. 13.* and also of this act, be made, shall limit and appoint, at their discretion, some certain reasonable time, within which such taxations and assessments shall be levied and collected, which time shall not exceed thirty days; and also, that if any such officer or officers, who are to levy, and collect such taxations and assessments, as aforesaid, shall refuse or neglect to levy, and collect the same, within such time, as shall be limited, and appointed by the said justices of the peace, for their doing thereof; or shall refuse or neglect to pay, and deliver over the sums of money, so levied and collected, to the said sheriff, and also to the said justices, in such manner as the same in the several cases before mentioned, are respectively directed to be paid, within the respective times before limited for such payment thereof, every such officer, shall for every such

such refusal or neglect, forfeit double the sum, appointed to be by him levied, and collected as aforesaid.

By *stat. 22 G. 2. c. 46. § 4.* No writ of execution, against the inhabitants of any hundred, on *any* judgment obtained, by virtue of *any* act of parliament, shall be levied on any particular inhabitant of such hundred; but the sheriff shall, on receipt of any such writ, cause the same to be produced to two justices of the peace, as is directed by 8 *Geo. 2. c. 16. § 4.* and thereupon the said justices shall, as is directed by the said act, cause a taxation to be made, and collected, for paying the costs and damages recovered by the plaintiff, and all such necessary expences as any inhabitant of such hundred shall have been at in defending such action; the same being first proved on oath, and the attorney's bill being first taxed, and the sums so collected, shall, within the time by the said act limited, be paid to the sheriff, and by him paid over to the persons intitled to the same, without deduction or fee.

By * *stat. 2 G. 2. c. 24.* No person shall recover against the hundred in any action, on any of the statutes of hue and cry, more than 200*l.* unless at the time of the robbery there be two present at the least, to attest the truth of his or their being so robbed.

By *stat. 30 G. 2. c. 3. § 11.* and 4 *G. 3. c. 2. § 118.* receivers of the land tax, shall not sue the county for a robbery, unless there were three persons in company carrying the money.

OF THE PLEADINGS, &c.

1. *Original.*

If an action be commenced upon the statute of *Hue and Cry*, 13 *Ed. 1.* the plaintiff must take out his original. And the suit in *B. R.* as well as in *C. B.* must be commenced by original; for the inhabitants of the hundred cannot be in custody of the marshal. And the original usually recites the statute. *Vide infra*, No. 2, 3.

The original shall be tested forty days after the robbery, otherwise it is error. *Vide post.* No. 4. and within a year after the robbery.

* The case of *Chandler* an attorney at law, who sued the hundred of *Sunning* in *Berks*, in the year 1748, was attended with so many suspicions, and being for a very large sum of money, occasioned the passing the above act of parliament.

But

But, if the day of the robbery be mistaken, it may be amended. 5 *Com. Dig.* 197, 8. For it is amendable, not being a penal action. *B. R. H.* 409. *Andr.* 115.

If several are robbed together, they cannot join in an action against the hundred, except where they are joint owners of the money stolen. 5 *Com. Dig.* 198.

If the bond is said to be taken before the *Secondary* to the chief clerk; it is well; and the court will take notice without averment, that he was *then* an officer. *B. R. H.* 409. *Andr.* 115.

It is not necessary to aver, that the high constable was the only one, nor that he was such at the time, nor that the justice was such at the time. *Ibid.*

2. *The Declaration must be against the inhabitants of the Hundred generally.*

The declaration must be against the inhabitants of the hundred generally. For if it is against any by name, and all are not named, it is bad.

The declaration need not recite the original at large. Nor need it recite more of the statute than is pertinent to the action. *Vide Action upon Statute, Div. IX.* And therefore may omit that part of the act which concerns the burning of houses. 5 *Com. Dig.* 198.

3. *As to reciting the Statute.*

If it recites the sense, though not the exact words of the statute, it is sufficient. *Vide Action upon Statute, Div. IX.*

As, if it is, *that they answer for the malefactors*, where the statute says, *for the bodies of the malefactors.* *R. 2 Vent.* 215.

4. *The Declaration must shew the Time of the Robbery.*

The declaration must shew the time when the robbery was committed, whereby it may appear that the action was commenced after 40 days since the robbery. *R. 2 Leo.* 12.

And the 40 days for taking the thieves are limited by the *stat. of Winton*, (for the 28 *Ed.* 3. c. 11. is only a confirmation thereof) and therefore they, who say that half a year was allowed by the *stat. of Winton*, are mistaken. *R. 3 Lev.* 320.

5. *The*

5. *The Declaration must shew that it was within the Hundred.*

So the declaration must shew the robbery to be within the hundred, and upon the highway.

But though the parish be mistaken, if it be within the hundred, it is sufficient. And if the parish be not alledged within the hundred, it is good after a verdict.

So, if it does not appear that the robbery was in the highway, it shall be aided after verdict.

So, if it does not appear that the robbery was by day-light.
5 Com. Dig. 198.

6. *As to the Declaration alledging Oath before a Justice of Peace.*

According to Com. Dig. 5 V. 198. the declaration must alledge that he made oath before a justice of peace, pursuant to the stat. 27 El. c. 13. that he did not know the robbers. But according to Salk. 614. it is held *cont.* for the declaration need not shew it.

If the robbery was by four, oath, that he did not know them, is not sufficient; without saying *nor either of them.* Per 3 J. Noy 21. Dub. 3 Lev. 328. 12 Co. 62.

7. *The Declaration must alledge Notice.*

So the declaration must alledge that the plaintiff gave notice of the robbery.

8. *The Declaration must alledge Property in the Goods.*

The declaration must also alledge, that the plaintiff has the property of the goods stolen.

If a servant be robbed of his master's money, he may declare *as of the proper money of the plaintiff.* And if the plaintiff declares *of money in the custody of him the plaintiff,* without saying *of the proper money of him the plaintiff,* it is bad.

But where the plaintiff declares that he was robbed *of the proper goods of him the plaintiff,* and of other goods *in the custody of the plaintiff,* on demurrer to the whole declaration, the plaintiff shall have judgment for so much as is well alledged, and shall be barred only for the residue. 5 Com. Dig. 199.

9. *The*

9. *The Declaration must state the particulars of the Goods Stolen.*

So the plaintiff must name the goods stolen in his declaration particularly; for it is not sufficient to say, *That they took divers goods.* R. 2 Sand. 379.

But he need not in the writ, if he particularise them in the declaration. *Ibid.*

And as much certainty, as in *trover*, &c. is sufficient. 2 Sand. 263.

10. *The Declaration must conclude contrary to the Form of the Statute.*

The declaration must conclude *contrary to the form of the statute*, for *contrary to the form of the statutes* is bad; the action being founded upon the *stat. Wint. 13 Ed. I. only.* and not on the *stat. 27 El. R. Yel. 116. 1 Vent. 235.*

But *contrary to the form of the statute*, without more, is sufficient; for it shall be intended the *stat. of Winton. R. Yel. 116. Noy 125. 2 Cro. 187. B. R. H. 409. Ader. 415.*

11. *The Plea.*

To an action against an hundred, the defendants may suffer judgment, by confession, or *non sum informatus.*

Or the defendants may plead, *not guilty.*

So they may plead, that the plaintiff did not make *hue and cry*, to give notice of the robbery. 5 Com. Dig. 199.

But *Semb. cont.* For the plaintiff need not make *hue and cry*, but by the *stat. 27 El. c. 13.* he ought to give notice to the next *Vill, or Hamlet*, and this shall be proved on, *Not Guilty.*

So they may plead, that they took one of the robbers on fresh suit.

But it is no plea for the hundred, that they made fresh suit, if they did not take any of the robbers. 5 Com. Dig. 199.

12. *Venire Facias.*

If the defendants plead, after issue, a *venire facias* shall be awarded to the next hundred. *Thes. Br. 144.*

13. *Judg-*

13. Judgment.

By the stat. 8 Geo. 2. c. 16. after judgment against the hundred, no process shall be served on the high constable or any inhabitant, but the sheriff on receipt of the writ of execution, shall shew it gratis to two justices of the peace in or near the hundred, who shall speedily cause an assessment to be levied pursuant to the stat. 27 Eliz. c. 13. and also for the necessary expences of the high constable above the costs and damages recovered, of which on notice from the two justices, he shall give an account and proof upon oath to their satisfaction, having first caused his attorney's bill to be taxed.

The sheriff shall pay the money levied to the parties without fee, and indorse the day of receiving the writ of execution, and not to be called upon for a return till 60 days after.

And the like assessment shall be in case the plaintiff be nonsuit, discontinue, or have a verdict or judgment on demurrer against him, if by insolvency of the plaintiff or his sureties he cannot be reimbursed on the bond of 100l. penalty; and the money levied shall be paid to the justices for the high constable in 10 days after it is levied.

And the justices may limit a time, not exceeding 30 days, for levying such assessment; and the officer appointed, refusing or neglecting to levy and pay the money, &c. in such time, forfeits double the sum.

If there be judgment for the hundred, the inhabitants of the hundred may sue for costs by debt or *scire facias* on the judgment; for, though no corporation, they may have an action *quoad hoc*. R. F. g. 296.

Or if the plaintiff be in execution for the costs and escapes, they may have an action against the sheriff for the escape. R. *Ibid*.

O U T L A W R Y.

I. Outlawry.

A man outlawed, is when by judgment of law a man by his own default is ousted of the law. Co. Lit. 122. b. 128. b.

Every man at his age of 12 years ought to be sworn to the law in a tourn or leet, and by his outlawry he is *positus extra legem*. Co. Lit. 122. b.

A woman

A woman who does not swear to the law, by judgment of outlawry, is not said to be outlawed, but *waiviata*. *Id.* And therefore, if a woman is said to be *outlawed*, it will be error. *R. 2 Rol. 804. l. 5.*

II. In what Cases it lies.

A man shall be outlawed for his default, if he will not stand to the law: And therefore upon an indictment for treason or felony, if the defendant does not appear upon the second *capias*, he shall be outlawed. So in an appeal. *St. P. C. 60. a. 67-* And if he does not render himself within a year, he shall be executed, without either judgment or trial. *3 Mod. 42. 72.*

So upon an indictment for a misdemeanor, or information he shall be outlawed, but he shall not be fined thereon, without other conviction for the offence. *5 Com. Dig. 612.*

If a peer does not appear upon an indictment for treason or felony, he shall be outlawed, *3 Inst. 31.*

Where a *capias* does not lie in *process*, the defendant cannot be outlawed before or after judgment: As, upon a writ of privilege by an attorney or another. *R. 1 Leo. 329.*

It lies not for less than 10l. *Semb. sed Qu. Barnes 320.*

If a defendant avoids an arrest, though he appears publicly, he may be outlawed. *Id.* Upon a total absconding, no endeavours to arrest are necessary. *Id. 322.*

How to proceed to outlawry, *Vide pleading in debt, No. 4.*

III. HOW AN OUTLAWRY SHALL BE AVOIDED.

1. For what Causes.

Outlawry shall be avoided, if the person outlawed, at the time of the outlawry pronounced, was within the age of discretion as if he was an infant under fourteen years: So, if a woman at the time she was waived, was married: So, if a man at the time of his outlawry, was in prison, it will be error: though the outlawry was for felony, or in a personal action. *5 Com. Dig. 612.*

But imprisonment is no cause to avoid an outlawry, if it be by *covin*, or consent. *Co. Lit. 259. b.* If a man in prison, brought to the bar, will not appear. *R. 2 Rol. 804. l. 50.*

If

If a man, at the time of his outlawry, was out of the realm, it will be error. *Skin. 6.* If a man was in the king's service with a captain, &c. in war. Or about the king's business, by his command under letters patent.

So, if he was out of the realm for his own private business, or for his pleasure, and not upon the business of the king, or of the realm.

Though he be outlawed for felony, or in a personal action. So, if he goes out of the kingdom upon the business of the king, or the realm, after *exigent* pronounced, he shall avoid the outlawry afterwards.

But, if a man goes voluntarily out of the kingdom, after *exigent* for felony pronounced, he shall not avoid the outlawry afterwards pronounced. *5 Com. Dig. 613.*

If it appears upon the record, or confession of the king's attorney. *Semb. 2 Rol. 12.*

Outlawry for treason cannot be avoided, because the party was out of the realm; for by the *stat. 26 H. 8. c. 13.* and *5 & 6 Ed. 6. c. 11.* process and outlawry against any for treason, who is out of the realm, shall be as good as if then resident in the realm. *3 Inst. 32.*

An outlawry may be avoided, if the person outlawed be misnamed, or his addition mistaken: As, if he be named *Knight*, when he was a *Baronet*. *R. Comb. 184.*

If he be outlawed by judgment of the *coroners* without naming them, except in *London* where the *Mayor* is coroner, and therefore *ideo utlagat' est*, is sufficient without more. *R. 2 Cro. 528, 531.*

By the *stat. 5 & 6 Ed. 6. c. 11.* If any, outlawed for high treason, within one year after yield himself to the chief justice, and offer to traverse the indictment on which he was outlawed, he shall be admitted so to do, and being acquitted of the indictment, shall be discharged of the outlawry. So, by consent of the *Attorney General*, he may reverse the outlawry for error. *3 Mod. 42.* And shall assign error at the bar, in proper person, *ore tenus*, and then the court assigns counsel to argue it. *Skin. 16.*

But the *stat. 6 Ed. 6.* does not extend where the outlaw is apprehended, and does not render himself. *R. 3 Mod. 47. vide infra.* So an outlawry for high treason shall not be reversed, because process was awarded against him when out of the realm, for by the *stat. 26 H. 8. c. 13.* and *5 Ed. 6. c. 11.* such process is good. *3 Inst. 32, 216. Dy. 287. a.*

A person committed for high treason in diminishing the coin, who makes his escape before indictment, and is then indicted

indicted and outlawed, and then retaken within the year, may have an *habeas corpus* to *B. R.* and surrender; then have a *certiorari* to remove the proceedings, plead his having been beyond sea, and have the outlawry reversed. *Stra.* 824.

An outlawry commenced and prosecuted during defendant's residence in *Ireland*, shall be reversed without bail, or appearance. *Barnes* 325. If the defendant was a prisoner pending the *exigent*, the outlawry shall be reversed on common appearance. *Barnes* 321.

When there has been misbehaviour in the plaintiff, the court will oblige him to reverse an outlawry at his own costs; but if it is a mistake, or error in law, it must be by writ of error. *B. R. H.* 123. Outlawry shall not be set aside for irregularity, on motion, because it is on debt by original in *B. R.* *Id.* 317. Proceedings shall not be staid because the plaintiff died before the return, if after the day of the outlawry. *Barnes* 323.

If the plaintiff dies after judgment, there must be a *scire facias*, or the outlawry shall be set aside. *Id.* 325.

Where the outlawry is not special, the defendants may reverse at their own expence, and payment of costs on common appearance; if before transcribing into the Exchequer, common costs to the *exigent*; if after, costs to the time of the reversal. *Barnes* 324.

Before defendant is returned outlawed, he may supersede the *exigent* on appearance and costs, but after, there must be bail, who are bound to pay the money, without option to render the principal. *Id.* 326. The Court will stay proceedings on payment of debt, and costs in a month. *Id.*

If in debt on bond by a wife *dum sola*, the husband is gone abroad and outlawed, and the wife, though she appears publicly, is waived, the outlawry against her shall be set aside on motion; but goods taken on *cap. utlagat.* must be deemed the husband's, though sworn to be her separate goods; and if she has equitable right, she must apply in equity. 2 *Wils.* 127.

In a *feme sole* is waived specially, on mesne process, and after *exigent*, and before outlawry marries, the court will not interfere. *Barnes* 321.

2. *When avoided.**By Plea.*

An outlawry may be avoided in two manners, by plea, or by writ of error. *Co. Lit.* 259. *b.*

If outlawry be avoidable for matter appearing upon the record, the party in the same term may reverse it by plea. *Id.* & *Bend. pl.* 137. As, for omission of any process. *Co. Lit.* 259. *b.* or variance. *Id.*

If outlawry does not lie in such case. *Semb. Dy.* 223. *a.* Or process was superseded before outlawry pronounced. *Id. Bend. pl.* 15. *R. Mo.* 73. 1. *And.* 36.

If no proclamation where the party was commorant, at the time of the *exigent*. Or no addition to the defendant. If no return upon process. Or the sheriff was removed, and another appointed upon record before the return. 5 *Com. Dig.* 614.

So for any cause, except want of proclamations; the party shall avoid the outlawry upon motion, where he comes in *gratis* upon the *exigent*, *alias*, or *pluries*. *Salk.* 426. So, if he comes in another term. 1 *And.* 36

So in *favorem vite* outlawry in felony may be reversed by plea, if it be voidable, for debt, imprisonment, out of the realm, &c. *Co. Lit.* 259. *b.*

But in *B. R.* an outlawry shall not be reversed by plea, but by error only, in the same term as well as in another, though it be error appearing upon the record. 1 *Rol.* 743. *l.* 10. *sed qu?*

If a man comes in upon the return of the *capias utlagatum*, he may plead in avoidance of the outlawry a matter which may avoid it by plea, *Co. Lit.* 259. *b.* And upon the plea and security given, there shall be restitution of the goods. *Hard.* 98. So, if there be matter, appearing upon record, to avoid the outlawry, the party who appears as *tertenant*, must demur, upon return of the inquisition taken upon the *capias utlagatum*. *Hard.* 58, 9. And several *tertenants* may join in demurrer. *Id.* 59. So a *tertenant* may plead the inquisition. 5 *Com. Dig.* 614.

If the defendant pleads, not the same person, it is tried *instante*. 1 *Burr.* 638.

If an exception goes to shew that the outlawry is nullity, it avoids it without a writ of error. *Ibid.* If error in fact is alleged, the court may give defendant leave to plead to the

indictment; if error in law, there must be a writ of error. *Ibid.*

According to *Strange* 834, a prisoner must first plead to the outlawry, and that must be tried before he can plead to the indictment. He may plead *ore tenus*, the Attorney General reply *ore tenus*; the venire is awarded, returnable *instant*; the jury returned sitting the court; he may have counsel; but he has not any peremptory challenge. *Id.*

The court cannot assign defendant counsel, on an outlawry for treason, till he has pleaded, and then he may have counsel on the collateral matter. 1 *Burr.* 638.

The court will allow the Attorney-General to confess error in fact, though not true, but not error in law, if not true. *Ibid.*

3. By Motion.

A man, *ut amicus curie*, may avoid an inquisition upon an outlawry, by matter apparent in it, upon motion. *R. Hard.* 86.

The court will not set aside an outlawry for want of proclamation, on motion. *Barnes.* 323.

It is discretionary, when to reverse on motion or not; if the defendant hath been long abroad, the court will not reverse at the plaintiff's expence. *Id.* 324, 5, 6.

As to reversing an outlawry by writ of error, the case of the *King v. J. Wilkes, Esq;* is well worth perusing. *v. 4. Burr.* 2527, &c.

4. By Error.

Generally where the outlawry is voidable for matter of fact, if it be not in felony, or treason, it must be avoided by writ of error. *Co. Lit.* 259. *b.*

An outlawry may be reversed by error, in treason, or felony. *Com Dig.* 614.

In treason there is not any need of a *seire facias* to the Lords, mediate or immediate; for no forfeiture accrues to them. *R. 4. Mod.* 366.

In felony, if it be suggested that the party hath no lands, and the Attorney General confesses it, there is not any need of a *seire facias*. *Salk.* 495. Otherwise, where the party hath lands, which for felony are forfeited to the Lord of whom held. *Ibid.*

If two are outlawed in the same action, and one appears to reverse the outlawry, error shall be in the name of both, 'till the other appears, and is summoned, and severed. *R. Salk. 496.* He was obliged to appear in person, until the *stat. 4 and 5 W. & M. c. 18.*

If error is brought, and the Attorney General confesses it, the outlawry shall be reversed, and the defendant immediately tried upon the indictment. *Salk. 495.*

If he assigns error for being out of the realm, it is sufficient to say generally, *that he was at the time of the outlawry aforesaid, &c. R. 2 Rol. 12.* Though he goes after the *exigent*; for, if he was then here, it shall be shewn on the other part. *R. 2 Rol. 804. l. 45.*

Outlawing a man beyond sea, is error, not irregularity. *Barnes 319.*

No bail is given in error of an outlawry, 'till reversal; and then it is to appear to an original, to be brought into two terms. *Stra. 951.*

A person outlawed for want of appearance to an indictment, for a libel against the government, shall have a writ of error, and be admitted to bail. *Fort. 37.*

A writ of error on an outlawry (even for felony) is never denied, if the witnesses are living. *Fort. 38.*

5. *The party restored after reversal.*

If the outlawry is reversed, the party shall be restored to all he lost. If a term be sold by the king, he shall be restored to the term. *5 Com. Dig. 615.* He shall have all his lands and tenements. *Id.* Though the king hath granted them to another and his heirs. *1 And. 188.* And he may enter upon reversal of the outlawry, without petition, or *scire facias.* *R. Id.*

So he shall be restored to a representation to an advowson. So to all his goods and chattels. To his stock in the *East-India* or any other company, though granted to another by privy-seal. *5 Com. Dig. 615.*

If the king's grantee acknowledges satisfaction upon a judgment, it shall be set aside in equity, and restitution made. *2 Vern. 313.* But the profits of lands received during the outlawry, shall not be restored. *Id.*

Nor *East-India* stock granted to *A.* by Privy Seal, and transferred to him by the company, where the restitution was to all *quod non fuit nobis responsum.* *R. 2 Lev. 49.*

If a lease be made by the *Exchequer* to the plaintiff of the lands of the outlaw, and he levies the profits by *Exchequer* process, which by order of the court are delivered to him; yet they shall be restored upon the reversal of the outlawry. 2 *Jon.* 101. But, if the king's lessee be outlawed, his term shall not be restored; for it was extinct. *R. Mo.* 237.

A lessee of the outlaw shall have trespass, for the profits received between the assignment to him, and the reversal. *R. Cro. El.* 270.

IV. FORFEITURE BY OUTLAWRY.

1. *In Treason or Felony.*

If a man is outlawed for treason or felony, he forfeits all his lands and tenements, goods and chattels. 5 *Com. Dig.* 615.

So money received by his servant, and brought to his house, though not delivered to him. *Sav.* 40.

2. *In personal Actions.*

What Things are forfeited.

A man outlawed in a personal action, forfeits his goods and chattels. And his chattels real, as a term for years. And the trust of a term.

If a tenant at will sows his lands, and is outlawed, the king shall have the emblements.

If a church is void, before the outlawry, the king is entitled to the presentment. *Sho. Parl. Ca.* 75. So, if the church becomes void after the outlawry, the king shall present. 5 *Com. Dig.* 615.

So the king shall have all the profits of his freehold lands. 2 *Rol.* 807. l. 32. *Vide post.* No. 3. So, if the lessor is outlawed, the king shall have the profits of his tenant at will; for by the outlawry the will is determined. *Id.* l. 35.

If a man be outlawed, after a judgment recovered by him, the king shall have the profits of all the defendant's lands, though the plaintiff can only have a moiety in execution. *R. 2 Cro.* 513.

If the king's lessee is outlawed, he forfeits his lease. *R. Mo.* 237.

So a man outlawed, forfeits stock in the *East-India* company, &c. 2 *Lev.* 49. 2 *Vern.* 313.

Upon

Upon a *levari facias*, after an inquisition upon an outlawry, a stranger's cattle, *levant* and *couchant* upon the outlaw's land, may be seized and sold; for they are the issues or profits of the land. *R. Skin.* 618. *Vide post*, No. 3, No. 4. No. 5.

A bond to *A.* who was trustee for *B.* will be forfeited by the outlawry of *B.* If a man recovers damages in a personal action, and afterwards is outlawed, the king shall have the damages, and execution for them, upon the judgment. If the conusee of a statute sues an *extent*, and hath the conusor in execution, and afterwards is outlawed, the debt is forfeited, and the king may discharge the conusor; for his body is not a satisfaction. *5 Com. Dig.* 616.

If *A.* hath judgment against *B.* who holds jointly with *C.* who aliens, and afterwards *A.* is outlawed, the king shall have an extent of the moiety of *B.* though the alienation was before the outlawry. *R. Lane* 20. So, if a statute is acknowledged to two, and one sues execution, and afterwards is outlawed, it will be forfeiture of the debt against both. *R. 2. Rol.* 808. *l.* 30. So, if a bond be made to two, one of whom is outlawed, the whole bond will be forfeited, *Semb.* *1 Rol.* 7.

3. What Things are not forfeited.

By outlawry in personal actions, a man does not forfeit any lands, of which he hath an estate of freehold. *2 Rol.* 807. *l.* 30. Nor a rent-charge for life, nor arrears which accrue for the rent-charge for life, nor arrears which accrue for the rent during his life. *Hut.* 54.

If *A.* seised in fee, leases for years, and is outlawed, the king shall not have the profits during the term. *Bro. patent.* 3. *Vide ante*, No. 2.

So he does not forfeit debts due to him upon contract. *2 Rol.* 806. *l.* 52. Or other *chose in action*. *Semb.* *Sav.* 40. Nor the equity of redemption of a term. *Semb.* *2 Vern.* 314. Nor money due to them upon mortgage. *Hut.* 53.

So he does not forfeit a thing, of which the interest was not vested in him: as, if lessee at will sows his land, and the lessor is outlawed, the king shall not have the emblements. *2 Rol.* 807. *l.* 35.

If a *feme-covert*, possessed of a term for years, be waived, the king shall not have the term. *Id.* 806. *l.* 45.

If

If an executor is outlawed, he does not forfeit the goods, which he hath of the testator's. *Id.* l. 47. Nor the goods, which he himself recovered as executor. *Id.* l. 35.

Nor the cattle of a stranger *levant* and *couchant* on his land. *R. Skin.* 617. *Cont. Vide ante*, No. 2. *Post.* No. 5.

A lease by the king, to a man outlawed will be good; for he hath a capacity to be a farmer to the king. *R. Mo.* 237.

4. *To whom the forfeiture shall be.*

If a man is outlawed, the forfeitures shall be to the king. Though he is outlawed in a personal action.

If a lessor of lands within a county *palatine*, is outlawed, though the *count palatine* hath the goods of the outlaw within his precinct; yet the king shall have the arrears of rent: for it follows the person. *Dub.* 2 *Rol.* 808. l. 40. *Lane* 90.

Yet the outlawry in a personal action shall be for the benefit of the party, if he pleases: And therefore if the defendant is taken upon a *capias utlagatum* after judgment, upon prayer he shall be in execution for the party. *Ca. Parl.* 73.

The king may grant the benefit of an outlawry to another. *R. 2 Rol.* 188. l. 5.

Upon outlawry in personal actions, the benefit is granted to the plaintiff, *ex gratia*.

5. *How Advantage shall be taken of an Outlawry.*

Upon the outlawry a general *capias* lies against the person outlawed. Or a special *capias utlagatum*, by which the sheriff is commanded, That by the oath, &c. he enquire what goods or chattels, lands or tenements, he had on the day of the outlawry, and that he extend and cause the same to be appraised, &c. *Off. Br.* 35. And thereupon the sheriff returns an inquisition taken by him. *Lut.* 330.

If the land be undervalued, there may be a *melius inquirendum*. *Hard.* 106. And such inquisition must be as certain as an indictment or declaration. *Semb.* *Id.* 58. And, therefore, if it finds several parcels of land, without saying of what nature, it will be bad; though it mentions the value and tenant's names. *R. Id.* 59.

But it is sufficient, if it shews the value of lands *in toto*, though it does not shew the value of every particular parcel. *R. Id.* 7. So, if it finds two marshes of such a value in the possession of *B.* though it does not say how many acres.

R. Id.

R. Id. 59. Or a close called *D.* though it does not mention quantity, or quality. *Id.* 76.

So of 6 closes of land and pasture, of a messuage or tenement, &c. are sufficient; for being only an office for information, so much certainty is not necessary, as in an office to intitle. *R. Id.* 191.

The return may be good in part, and quashed for part. *R. Id.* 59.

If there be a variance in the outlawry returned to the *Exchequer*, from the record in *C. B.* it may be amended. *R. Id.* 7.

An information lies in the *Exchequer*, in nature of trover, against him who hath goods of the outlaw, and does not deliver them. *R. per Hale*, 1 *Mod.* 90.

After the inquisition returned in *C. B.* a transcript thereof shall be transmitted to the *Exchequer*, and thereupon a *scire facias* goes against him, who hath goods of the outlaw in his hands. *Lut.* 331.

By bill, by the *Attorney General* in the *Exchequer*, a discovery of his real and personal estate and the grants made of it, may be required; for the outlawry is in the nature of a judgment for the king. *R. upon Demurrer*, *Hard.* 22.

A common person may demand a discovery against an outlaw, by bill, to enable him to take out execution. *Id.*

Where a man is outlawed in a personal action, the king may take the profits of his freehold: as, the rent, corn, grass, &c. 2 *Rob.* 808. *L.* 5. And may grant to another, to levy the profits in his name. *Id.* 1. 22. So he may make a lease to the outlawed person himself; for he is capable as a farmer. *R. Mo.* 237. *Vide Infra.*

The cattle of a stranger *levant and couchant* upon the land, shall be taken as the issues of the land. *R.* 1 *Salk.* 395. 5 *Mod.* 117. So the cattle of a commoner or tenant in common, if his title is not found by the inquisition. 1 *Salk.* 395.

It is the usual course of the *Exchequer*, to grant a lease of the lands of the outlaw, to the party who sues the outlawry. *Ca. Parl.* 72. *Hard.* 106. *R. Mo.* 237. And the lessee may take the profits, to the value extended, but not the other profits, if they are of greater value, before a *melius inquirendum*, which finds the full value. *R. Hard.* 106. So the party, at whose suit he was outlawed, may obtain a grant of the lands by privy seal. 5 *Com. Dig.* 618.

If the lands of the outlaw are seised, and the inquisition returned, the outlaw, by his feoffment, or sale afterwards, cannot

cannot defeat the king, &c. of the profits. *R. 1 Lev. 34.* So they cannot be afterwards extended by *elegit*, upon a judgment before the outlawry. *R. Ca. Parl. 75. R. Hard. 106. R. if there be no covin. Salk. 495.*

The heir of a feoffee of the defendant, shall be bound by the outlawry. *Id. 395.*

The king has not the possession of freehold land; for he cannot grant or lease generally. *2 Rol. 808. l. 15, 20.* Neither can he plow the land, to sow. *Id. l. 7.* Nor seize the land; for then upon pardon, or reversal of the outlawry, he would be put to sue *livery*. *Id. l. 12.* Neither can he cut trees, or underwood, *Id. l. 10.*

A man outlawed, may make a feoffment, whereby the king is deprived of the subsequent profits. *Id. l. 17.* But this is intended of a feoffment before *seizure* for the king. *1 Lev. 34. 1 Salk. 395.*

If he levies a fine before seizure, the estate passes. *R. 1. Lev. 33. Raym. 17.* Or makes a bargain and sale. *Semb. 1 Lev. 33.*

Before seizure, execution may be upon the land by *elegit*. *Semb. 1 Lev. 33. R. Hardr. 75.* So, if, before the inquisition returned, he makes a lease *bona fide* for a valuable consideration. *R. Hardr. 101.* And an assignment by such lessee, after the inquisition returned, will be good. *R. Id. 422.*

A stranger having title before seizure, may enter and maintain an ejectment. *R. Id. 176.*

By a feoffment after seizure, the estate passes to the feoffee, though the king shall have the profits during the outlawry. *1 Salk. 394.*

The lessee of lands seized by outlawry shall account for the profits, (which he might have received without his default) to another creditor of the outlaw, who hath an interest in the land. *Hardr. 106.*

Personal chattels are forfeited and vested in the king by the outlawry, before inquisition found. *R. 1. Salk. 395.* But chattels real, and the profits of land are not forfeited, till inquisition found. *Id.*

Upon an inquisition on an outlawry, a term for years cannot be sold by the sheriff; for the profits only are forfeited to the king. *Semb. Bunb. 104.*

If a man is outlawed in a civil action, and there issue an extent, inquisition, and *levari facias*, and 5*ol.* is levied thereon, it may not be paid to the plaintiff on motion, though the defendant consents, if no one consents for the crown; for it belongs to the king if a lease is not taken out. *Bunb. 38.*

Capias

Capias Utlagatum.

After outlawry returned, the plaintiff shall have a *capias utlagatum* against the defendant. *Vide ante No. 5.* or special against him, his goods, and lands. And thereon an inquisition shall be taken and returned. *5 Com. Dig. 215. Vide ante pleading in debt, No. 6,* upon this subject at large,

QUARE IMPEDIT.

I. What Remedy for a Church.

Remedy by law was provided for the recovery of a church, or for its revenues.

By the common law, there were three writs for the church itself, viz. right of advowson, *quare impedit*, and assise of *darrein presentment*. *2 Inst. 357.*

For the revenues of the church, the parson had remedy for his lands and tenements by *Juris Utrum*. This mode of proceeding is now seldom if ever used, as the parson hath all the same remedies, by trespass, ejectment, &c. as any other person; and which are more easy, simple, and expeditious, and better known in their mode of proceeding.

II. Right of Advowson.

By the common law, in all cases where the church was full by institution, against a common person, or by institution and induction, against the king, the rightful patron would lose the advowson, if he did not recover the inheritance of it by a writ of right or advowson. *R. 6 Co. 49. 2 Inst. 357, 8.* Though the presentation upon which the church was full, was made by usurpation. Though the patron was an infant, *feme covert*, &c. *6 Co. 49.*

But in all these cases the patron, seised of the advowson in fee, may have remedy by the writ of right of advowson. *F. N. B. 30. B. F.*

So, before the *stat. de donis* 13 Ed. 1. A patron who had a fee simple conditional, if he was ousted of the advowson by usurpation, should have had a right of advowson.

So, if he, who had a right to collate, was ousted by a plenarty upon a collation without title, he should have had a writ of right. 6 Co. 50. a.

A right of advowson lies for the advowson of a vicarage, prebend, chapel, &c. as well as of a church. F. N. B. 31. C. E.

If a parson who sues in the spiritual court for tithes to the 4th part of the advowson in value, be prohibited by an *indicavit*, his patron shall afterwards have right of advowson. Id. 30. E.

So it lies of a moiety, or third, or fourth part of a church. Id. 30. D. And by common law, of a less part; but that is now ousted by *stat. West. 2. 5.* F. N. B. 30. E.

If A. and B. are seised of an advowson, and to the heirs of B. they may join in a right of advowson for the benefit of him who hath the fee. Id. 30. F.

But a right of advowson does not lie by a tenant for life, or years. Id. 30. B. Nor, by tenant by the courtesy, or in dower. Id. Nor, by a tenant in tail since the *stat. de donis*, though he has a fee expectant. Id.

If a man hath purchased an advowson, to which he had never presented, he should not have had a right of advowson before the *stat. Westm. 2. 5.* but his advowson was lost. 2 Inst. 358.

How the Proceeding in it shall be.

In a right of advowson, the process shall be summons, and *grand cape*. And the summons shall be made upon the glebe, which shall be seised into the king's hands upon the *grand cape*. 5 Com. Dig. 343.

The plaintiff shall count of the possession of his ancestor, or his own possession. F. N. B. 30. B. And ought to lay the *esslees* in the parson, in taking tithes, oblations, &c. Id.

The tenant shall come and make defence. Id. C. And shall have a view of the church. 5 Com. Dig. 343.

So he may join the *mise* by battle, or the grand assise. F. N. B. 30. C.

In the case of the king, the tenant cannot tender a demy-mark, to inquire of the seisin alleged by the king in his court, as he may in the case of a common person. Id. 31. D.

III. *Affise of Darrein Presentment,*

1. *When it lies.*

An affise of *darrein presentment* lies, where a man or his ancestor, has presented to a church, and upon a subsequent avoidance, another usurps upon him.

So, by the *stat. Westm. 2. 5.* the heir, or he in reversion, shall not be prejudiced by a presentation by his guardian, or by tenant in dower, by curtesy, for life, or for years, or by the donee in tail, but that he may have such action possessory at his full age, or when the reversion comes into possession, as his ancestor might have had upon the last presentation in his time.

So he shall have this writ, though the last presentation was made by tenant by the curtesy in dower, for life or for years; if those estates did not commence by the grant of the plaintiff himself. *F. N. B. 31. G.* So, if a guardian made the last presentation in right of the plaintiff, then an infant. *Id. I.* Or a stranger, by usurpation upon the plaintiff, then an infant. Or a stranger, by usurpation in time of war, though the plaintiff was of full age. *Id.*

2. *When not.*

An affise of *darrein presentment* does not lie by one coparcener against another. *F. N. B. 32. A.* Nor if tenant for life, or for years, claims by a lease from the plaintiff himself. *Id. 31. L.* Or, if an infant purchases an advowson, and an usurpation be made upon him. *Id.* Or, if an usurpation be upon a feme covert, who purchased the advowson. *2 Inst. 360.* So if a purchaser be a bishop, &c. *Id. 358.*

3. *How the Proceeding shall be.*

The proceeding in affise of *darrein presentment* is conformable, in many respects, to the proceedings in an affise of *novel disseisin*. *Vide Com. Dig. 1 V. tit Affise of Novel Disseisin.* and *Booth's Real Actions. 210. 262.*

By *stat. Mag. Chart. 13.* it shall be *coram Inst. de Banco*; though before it lay in *B. R.* *2 Inst. 27.*

Plenary is no bar in assise of *darrein presentment*, any more than in *quare impedit*, if it was not for six months before the writ purchased, by the *stat Westm.* 2. 5. 2 *Inst.* 360.

IV. *Quare Impedit.*

When it lies.

Quare impedit is an ancient writ, which lies by him, who being in possession of an advowson of a church, is disturbed in his presentation to it. 2 *Inst.* 356.

By the *stat. Westm.* 2. 13. *Ed.* 1. 5. If any, not having right present during the minority of an infant, in the time of tenant in dower, by the curtesy, for life, for years, in the time of tenant in tail, &c. the infant at full age, he in reversion, and the issue in tail, may have the same remedy for recovering the possession of the advowson, as his last ancestor, &c. might have had in his time. The same remedy is for a *feme covert*, or man of religion, if the usurpation be during coverture, or vacation. 2 *Inst.* 353.

And, therefore, an infant who has an advowson by descent, after his full age, shall have a *quare impedit*, or *darrein presentment*, though the usurpation was upon him during his minority. 2 *Inst.* 358, 9. So an infant may have it during his minority, when he is out of wardship. *Id.* 359.

An infant shall have a *quare impedit*, if an usurpation be upon him, though his ancestor purchased, and never presented to the advowson. *Id.*

So, the heir of him in reversion, after an usurpation in the time of tenant by the curtesy, in dower, for life, for years, tenant by statute-merchant, staple, or *elegit*. *Id.* and *Jon.* 48. So, the issue and tail, after an usurpation in the life of tenant in tail. 2 *Inst.* 359. *Jon.* 49. So, the successor of him in reversion, if an usurpation be upon the lessee, &c. of an ecclesiastical person. *Semb. Jon.* 48.

But, if an infant purchases an advowson, and an usurpation be upon him, he is not within this statute. 2 *Inst.* 358. So the lessor himself is not within this statute, though the heir is, when the usurpation is upon his lessee, &c. 2 *Inst.* 359. Nor a man in remainder, nor his heir. *Id.*

A *feme covert* shall not have aid by the statute, if an usurpation be, during the coverture, to an advowson purchased by her. *Jon.* 49.

If

If an usurpation be upon a bishop, or other ecclesiastical person, his successor shall not have *quare impedit*; for the statute aids only upon an usurpation in the vacation, or when the ancestor could not have remedy at the time of the usurpation. *Semb. Jon. 47, 49. F. N. B. 34. M.*

PROCEEDING in *Quare Impedit*.

I. *The Process.*

All writs of advowson in a church, viz. right of advowson, *quare impedit*, and assise of *darrein presentment*, by a common person shall be in *C. B. Reg. 29, 30.* But a *quare impedit* by the king, may be in *B. R. or C. B. F. N. B. 32. E.*

The process in *quare impedit* is, summons, attachment, and distress. *1 Brownl. 158. 2 Inst. 124.* And by the common law it was distress infinite. *2 Inst. 124.*

But now by the *stat. Marl. 52. H. 3. c. 12.* if the defendant does not appear, nor cast an essoin on the first distress, or before there shall be judgment for the plaintiff, and a writ to the bishop. Though upon the summons or *pone*, the defendant was not summoned, but *nihil* returned. *5 Com. Dig. 276.*

By the *stat. of Marl.* the sheriff ought to make summons by good summoners, and return their names upon the original. *1 Brownl. 158.* And if the sheriff do not do it, *disceit* lies against him. *Id. and Dy. 353. b.*

The summons shall be served upon the defendant, or at the church door. *1 Brownl. 158. 2 Mod. 265.* And if he be not actually summoned, there shall not be judgment upon default at the distress. *R. 1. Mod. 248. 2 Mod. 264.*

If there are two defendants, and one does not appear, &c. upon the first distress, the plaintiff shall have judgment and a writ to the bishop, though the other defendant appears, and perhaps shall have a writ to the bishop also. *2 Inst. 124, 5. R. Bendl. pl. 136.* And if all the defendants make default upon the distress, the plaintiff shall have judgment against all, for all are supposed disturbers. *R. Mo. 81.* But upon default after continuance, there shall be a *distingas*, instead of a *petit cape*. *2 H. 4. 1. b.*

But before a writ to the bishop, the plaintiff ought to make title, and there shall be process to inquire of four points, *R. Mo. 81. Vide post. 11.* He shall make title. *Bendl. pl. 136. 207.*

At the return of the summons, or *pone*, the defendant may have the common essoin. *2 Inst. 125. 1 Brownl. 159.*

Or

Or an effoin *de malo Lecti. Semb. 2 Inst. 124.* And if there are several defendants, one may be effoined after another. *1 Brownl. 159.* But the defendant shall not have an effoin *de servitio regis ultra mare. 2 Inst. 125. 1 Brownl. 160.* Nor shall have protection, nor his age. *1 Brownl. 160.*

By the *stat. 12 Ed. 2. §. 2.* after default and re-summmons, the defendant shall not have an effoin. *R. Cro. Car. 341.*

If the defendant casts an effoin, the plaintiff ought to adjourn it for fifteen days, otherwise he shall be nonsuited. *1 Brownl. 159. Dalt. 81, 2.* And at the day given by the adjournment, the defendant need not appear, nor before the return of the *distringas. 1 Brownl. 159.*

By the common law, and now by the *stat. art. sup. chart. 15,* in summonses and attachments, there ought to be fifteen days exclusive at least between the *teste* and return, in which time, at twenty miles *per diem*, any one may come from the extreme part of *England. 2 Inst. 567.*

By the *stat. Marl. 52 H. 3. c. 12.* In *darrein presentment*, or *quare impedit*, there ought to be only fifteen or twenty-one days before the return. Or a longer day may be given by consent of parties. *2 Inst. 124.* But such consent ought to appear upon record. *Id.*

The summons ought to be tested the same day it issues, that there may not be any prejudice in respect of *Lapse. Reg. 30. a. Bro. Qu. Imp. 151.*

2. Original.

An original in *quare impedit* may be sued *de ecclesia*, which always imports a rectory, or parsonage. *F. N. B. 32 H.* So. it may be by common law, or at least by the *stat. Westm. 2. c. 5. de capellis, prebendis, vicariis, hospital', priorat', abbat' et aliis domibus, quæ sunt advocacionibus aliorum. 2 Inst. 263. 2 Rol. 98.* And therefore of an archdeaconry. *R. 1 Leo. 205. 1 And. 241.*

The writ ought to name the advowson truly as it is, *viz. ecclesia, vicar', &c. F. N. B. 32 H. 33. F. G.* Yet if it be in the disjunctive, *ad ecclesiam sive hospital'*, it is good. *R. Cro. El. 791.*

Net the writ may be general, and the count special: as, if a *quare impedit* be brought by him who has only a moiety of the advowson, or the advowson *medietatis ecclesie*, the writ may be general, *presentare ad ecclesiam*, and the plaintiff shall count

count upon the special matter. *F. N. B. 33. A. 5 Co. 102. b. 10. Co. 135.*

So, if the plaintiff has only the nomination, collation, &c. and not the right of presentation, the writ shall say *præsentare*, and the plaintiff shall count specially. *F. N. B. 33. B. C. D. E.* and if it be *nominare*, it abates. *1 Brownl. 159.*

So the writ may say generally, *quæ ad nostram spectat donationem*, and the count declare by what title. *5 Com. Dig. 277.*

But if there be a distinct patron, and incumbent of one moiety, or part of a church, and another patron or incumbent of the other moiety, or part, the writ is good, if it is special *præsentare ad medietat'. &c. ecclesie. R. 10. Co. 135. b.* And *ad rector' medietat'*, or *medietat' rector'* is of the same import. *4 Co. 75.*

In what county it shall be brought. *Vide Action, Div. XII. No. 1, &c.*

If it abates by death, it may be brought by *Journies Accompts*, *1 Brownl. 158.* So summons and severance lies, if one plaintiff will not sue. *Id.*

The plaintiff may have several *quare impedit*s against every defendant. *5 Com. Dig. 277.*

3. Declaration in *Quare Impedit.*

If one defendant appears before the others, the plaintiff may declare against him *simul cum*, &c. *1 Brownl. 159.*

A *quare impedit* shall be brought by the king, in right of his crown, or upon a title by lapse, or by a common person. *5 Com. Dig. 277.*

Several, who have the same title, may join. *Mo. 184.* A man, who has the nomination, and another, who has the presentation, may join, if a stranger presents. *Dy. 48. a. in marg.* Or have several *quare impedit*s. *Mo. 40. Dalt. 48.*

An executor or administrator may have a *quare impedit* upon an avoidance in the lifetime of the testator, &c. *5 Com. Dig. 278.*

If a grant of the next avoidance be to two, and one releases to the other, the releasee alone may have a *quare impedit*. *R. Mo. 467.*

A *quare impedit* is usually sued against the patron, who presents the incumbent who was presented, and the bishop. *1 Brownl. 159.* But the writ does not abate, if the bishop is omitted; and therefore it will be well to omit him, if the church is full. *Hob. 320.*

Yet

Yet the bishop, if he is omitted, may present by *lapse*, except when a *ne admittas* is sued by the plaintiff within six months. *Semb.* that the bishop may present by *lapse*, though a *ne admittas* be delivered within six months; but he cannot admit the clerk of the party, or of any other presented within six months. 5 *Com. Dig.* 278. To the last point cites *F. N. B.* 48. *L.* *Sed qu.* if he can admit any one, if a *ne admittas* is delivered in due time?

The writ may be against the patron alone, omitting the incumbent; but then the plaintiff shall not have a writ to the bishop to remove him, if he was admitted, *pendente lite*. *Co. Lit.* 344. *b.* *F. N. B.* 35. *C.*

In a right of advowson, the incumbent shall not be named. *Hob.* 319. Nor shall be removed, if the plaintiff recovers. *Id.* & *Sav.* 109.

It may be against the incumbent alone, where the patron is not disturbed, nor has prejudice by the suit: As, in *quare impedit* upon an avoidance by simony of the incumbent. *Semb. Lut.* 1089. *R.* 3 *Lev.* 16, 206.

In *quare impedit* by him who has the nomination to a church in the presentation of an abbot, which comes to the king, and he presents a clerk, without a nomination, the *quare impedit* shall be against the incumbent alone; for the king cannot be a disturber. *R. Dy.* 48. *a.*

So, where the incumbent is collated by *lapse*, or is the only disturber. 1 *Leo.* 45. *R.* 2 *Leo.* 58. *Sav.* 108. *S. F.* But more particular.

Also *Vide* 7. *Co.* 26. *a.* *S. C.* There it was resolved that the writ should abate, for various reasons. Also, that the patron ought to be named, but this was not collation by *lapse*, the bishop disclaiming, except as ordinary. This case in 7 *Co.* contains great and very extensive learning on the subject, and seems to be the best I have met with in the books. There is a very excellent case and very full in *Hob.* 315. *Elvis Knt. v. Archbishop of York and others.*

As to the doctrine of collating by *lapse*, *Vide Hob.* 316, 317, 319, &c. *Vide also Burn's Eccles. Law. Tit. Advowson, 1. V. p. 20. &c.*

It shall be against the incumbent alone in every case, where the interest or estate of the patron is not divested by the judgment in the *quare impedit* *R.* 7. *Co.* 26. *a.* And it is safest not to make more defendants than necessary. *Hob.* 320.

If the patron is not named, a defendant when he ought, if it be not pleaded in abatement, it shall not be error. *R.* 2 *Cro.*

Cro. 651. So, where the king is patron, it shall be sued against the presentee only. *Keil.* 53. a.

4. Must shew a Title to the Advowson.

The plaintiff in *quare impedit* must alledge a title to the advowson in some one, from whom he claims by descent. *Hob.* 132. (*Vide Infra.*) For a presentment without a title to present is not sufficient. *Vaug.* 57. And generally it ought to alledge a seisin in fee. But, that he was seised generally, shall be intended in fee. 8 *H.* 5. 4. b. So seisin for life is sufficient, *Semb. Id.* I conceive there is not a doubt.

Seisin by purchase is sufficient. Or by grant of the next avoidance. *Id.* & *Lut.* 1. Or by grant of an estate for life, for years, or other particular estate. *Semb.* 5 *Co.* 98. a.

Here I conceive there is not a doubt.

Or he may alledge a title to the advowson in himself. *Hob.* 102. And a title to the advowson, as well as presentment, ought to be alledged in the case of the king, as well as of a common person. *Vaug.* 57. So the king ought to alledge in what right he is seised. 1 *Leo.* 227.

If the plaintiff claims by a gift in tail, he must alledge a title to the advowson in the donor, and derive his title under the donee. *Hut.* 31.

If the plaintiff claims a right to present against common right, he must shew the commencement of it: As, if he alledges presentations by turns, he must shew how this commenced; by prescription, composition, or otherwise. *Dy.* 299. 3 *Leo.* 163, 4.

Yet if *A.* was seised of a manor to which an advowson, viz. to present twice, belongs, &c. it is sufficient, for this shews a prescription. *R. Dy.* 299. a.

The plaintiff must shew whether the advowson be *appendant*, or in *gross*. *Semb. Lut.* 1. *Vaug.* 7, 8. But if the king intitles himself to a presentation by a simoniacal contract, it is sufficient to alledge a presentment by such a one, *cui de jure pertinuit*, without shewing what title he had to the advowson; for the king is a stranger to it. *Semb. Lut.* 1093. I conceive this is clearly law.

If the plaintiff alledges that he was seised of the advowson, *scilicet* to present every first turn, it will be good. *R. Ma.* 867.

The plaintiff must shew a title in himself before the avoidance; and therefore if the acceptance of a plurality, by

which the church is void, be alledged at a day before the grant of the next avoidance, by which the plaintiff claims, it will be bad. *R. after verdict for the plaintiff. Dy. 129. b. Bend. pl. 79.*

If there are several plaintiffs and they vary in title, the writ abates. *R. Mo. 184.*

If tenants in common make composition to present by turns, the plaintiff in his count must mention the composition, if *quare impedit* is brought before the composition is executed, *i. e.* by each having presented in turns; but if *quare impedit* is brought after composition executed, it need not be mentioned. *Dy. 29. a.*

But by *Dy. 259. b. 299. b.* It should seem, that in every case where the plaintiff shews a right to present by turn, he ought regularly to shew how such right commenced, by prescription, composition, or otherwise.

It may commence between parceners, joint-tenants, and tenants in common, by record, or by deed. *R. 1 Salk. 43.*

A composition by parceners need not be shewn; for it may be without deed. *Dy. 29. a. 1 Salk. 44.*

Where the plaintiff claims a turn to an advowson appendant, he need not shew the commencement of the presentation by turns, whether it was by prescription, composition, or otherwise; for the appendancy imports a prescription. *Dy. 299.* And the plaintiff may claim the entire advowson when it is his turn. *R. 1 Brownl. 165.*

In *quare impedit* by a grantee of the next avoidance, he must shew that it is the next avoidance. *Semb. Dy. 129. b.* This, I apprehend, is law.

5. *The Plaintiff must alledge a Presentment.*

The plaintiff in *quare impedit* ought always to alledge a presentment by himself, or by his ancestor, or some other under whom he claims. *Vaug. 7, 17, 57.* Tho' the advowson be vested in the patron by act of parliament. *Semb. 3 Lev. 436. Cont. 21 Ed. 4. 3. b.* And regularly a presentment ought to be alledged to have been by him who has the inheritance. *5 Co. 97. b.* But it may be alledged to have been by him, from whom the plaintiff claims. *2 Inst. 356.*

If a presentment be alledged by a tenant for life, for years, or other particular tenant, it is sufficient for him in reversion. *5 Co. 98. a.*

So, if the plaintiff shews a grant of the next avoidance, and alleges a presentment by a grantee, it is sufficient for him,

him, who claims under the grantor ; for he presented in right of the grantor. 5 *Com. Dig.* 280.

A purchaser may alledge a presentment by the vender. 2 *Inst.* 356.

In *quare impedit* by tenant for life, or years, it is sufficient that the plaintiff alledges seisin in the lessor, the demise, and a presentment by the lessee himself. *Dub. Hob.* 285. *R.* 1 *Leo.* 230. I am inclined to think there is not much room for doubt.

The plaintiff may alledge presentments by the grantor and the grantee of a particular estate, and it will not be double. 5 *Co.* 98. *a. Cro. El.* 518.

If the plaintiff alledges a presentment, without a precedent title, he must say that it was *tempore pacis*. 1 *Mod.* 230. But he need not, if a precedent title be alledged. *Id.*

If a presentment be alledged by a common person, he must say that the clerk was thereon instituted, and inducted. *Bend. pl.* 297.

If by the king, or by him, who intitles himself by the king, that he was *instituted* is right.

The last presentment regularly shall be mentioned, and therefore if the bishop presents by *lapse*, upon the next avoidance, the patron in *quare impedit* shall make mention of that. 3 *Leo.* 18. *Dalt.* 75. But if there be an usurpation upon the king, a grantee of the next avoidance need not mention that, but only the last presentation by the king. 5 *Com. Dig.* 280.

The crown as well as a subject must alledge a presentation ; and a *commendam retinere* is not sufficient. *Stra.* 1006. But the want of it is cured by verdict. *Ibid.*

6. The Plaintiff must alledge Disturbance.

The plaintiff in *quare impedit* ought to alledge a disturbance. And, if it be by an executor or administrator upon an avoidance in the life of the testator, &c. a disturbance in the life of the testator, &c. is sufficient. *R. Sav.* 95. *Lut.* 2.

But the plaintiff shall not say in *retardatione executionis testamenti*. *R. Sav.* 95 *R.* 1 *Leo.* 205.

7. Pleas in *Quare Impedit*.*In Abatement*———*Misnomer, &c.*

To a declaration in *quare impedit* the defendants may im-
parl. And afterwards may join in plea, or plead severally.
Bro. Qu. Imp. 157, 165.

The defendant may plead in abatement, or to the action.

An ordinary cannot plead in abatement, or cast an essoin,
without making himself a disturber. *Hob.* 200.

In abatement the defendant may plead, that the plaintiff
or defendant is misnamed, or has a false addition to his
name. *Bend. pl.* 109.

So they may plead variance between the count and writ.
Salk. 559. That there are two churches, and neither with-
out addition, &c. or, that the church is misnamed. 5 *Com.*
Dig. 280.

The incumbent may plead in abatement, that such an
one is not named a defendant, when he ought to be. 7 *Co.*
25. *b. Hob.* 316. *Vide ante*, No. 3.

But the bishop cannot plead in abatement, that the patron
is not named. *Hob.* 317.

He may plead another *quare impedit* depending for the
same disturbance. *R. 1 Brownl.* 163. So, though it is for
another disturbance for the same avoidance. *R. Hob.* 137.
Or adds another defendant. *R. Hob.* 138.

So he may plead in abatement *darrein presentment*. 5
Com. Dig. 281.

8. *Plenary*.

So he may plead *plenary*, before the writ purchased, of
the presentment of the plaintiff himself. *Tb. D. l. 11. c.*
42. § 20. Though he does not say, that the *plenary* was for
six months. *Id. R.* by common law; for by institution and
induction, or by institution only, against a common person,
the church is full, and the plaintiff shall lose his presenta-
tion *hac vice* for ever. *R. 6 Co.* 49. *a.*

So he may plead *plenary* for six months before the pur-
chase of the writ, of the presentment of the defendant him-
self. *Tb. D. l. 11. c. 42. § 22.* Or, of the presentment
of a stranger. *Co. Ent.* 498. *b.*

By the common law *plenary* before the writ for any time
was a good plea. 2 *Inst.* 360.

But

But by the *stat. Westm. 2. c. 5.* it must be a plenarty for six months. And it ought to be six months before the first writ, if another writ be sued by *journeys accompts. Th. D. l. 11. c. 42. § 8.*

But, generally, plenarty is no plea against the king. 2 *Inst.* 361. Though he claims in right of his ward, &c. and not in *jure coronæ. Id. & R. 1 Leo. 226.*

Yet if the defendant alledges a right of advowson in himself, he may plead plenarty for six months against the king. *Th. D. l. 11. c. 42. § 7. 17. Dub. § 3.* Why is not this law?

So, by the law, plenarty shall be a good plea against the queen. 2 *Inst.* 361.

Plenarty, upon a collation by a bishop by wrong, is no plea. *R. 1 And. 243. Sav. 118.* So, though the bishop collated after a *lapse. Dub. 1 And. 243. Et Qu. de hoc?*

If the defendant pleads plenarty, he must shew of whose presentment. *Th. D. l. 11. c. 42. § 2.* And at what time. *Id.* So, regularly if the defendant pleads plenarty of the presentment of an ecclesiastical person, he ought to shew the right of patronage in him. *Id. § 4, 5.* So, if he pleads plenarty of the presentment of himself by such an one. *R. 1. Brotonl. 162.*

But a lay patron may plead plenarty of his own presentment, without shewing a right to the patronage in him. *Th. D. l. 11. c. 42. § 4.*

Plenarty shall not be intended, if it is not pleaded. *Ion. 332.*

9. Pleas in Bar.

In bar of a *quare impedit*, the bishop, to shew he is not a disturber, may plead, that he claims nothing but as ordinary. The ordinary must disclaim, or admit himself a disturber. 5 *Com. Dig. 281. Vide ante, No. 7.*

If he refuses a clerk without cause, he is a disturber. 1 *Leo. 230.*

The clerk may plead that he claims nothing but as *persona impersonat ex presentatione* of such an one. 7 *Co. 26 a. Vide Entries to L. Ray. Rep. 459,* for this, and collation by *lapse.*

The bishop may plead collation by *lapse. Vide Entries L. Ray. Rep. 459.*

Upon a plea by the bishop that he claims nothing but as ordinary, the plaintiff may have judgment against him, with a writ

a writ to the bishop, but *cessat executio* till the other pleas are determined. *Vaug.* 6. *Hob.* 320. *Keil.* 43. *a. vide post.* No. 12.

If a *cessat executio* is not entered, it is only form. *R.* 1 *Rol.* 363. But if there be not a *cessat executio*, it is error, if execution be before the other pleas are determined. *Id.*

Every other defendant may plead *quod non impeditur*. *Win.* *Ent.* 709. *Vaug.* 58.

If the bishop disclaims, and the plaintiff does not accept his disclaimer, but will maintain him a disturber, and it is found against the plaintiff, he shall not have a writ to remove a clerk collated *pendente lite*. *Hob.* 320.

If one defendant pleads *non impeditur*, and it is found against him, there shall be a writ to the bishop with a *cessat executio*, till the plea between the others is determined. 1 *Brownl.* 159.

The plaintiff upon such plea may have a writ to the bishop, or by replication maintain the disturbance, in order to have damages. *Vaug.* 58.

The defendant may plead in bar a release. Or, that he is parson *imparsoned*, and traverse his resignation. 5 *Com.* Dig. 282.

If the incumbent pleads, that he is *persona impersonata*, he ought to say of whose presentation. *Hob.* 320.

The defendant may plead in bar a presentation upon title and traverse. But if the incumbent pleads a presentation of such an one, he cannot make title except to the same patron, by whom he was presented. *Ion.* 5. *Hob.* 321. And therefore, if he pleads himself to be *persona impersonata* of the presentment of such an one, the plaintiff may reply that he was not presented by him. *R.* *Ion.* 5. But it will be more formal to say, that he is not *persona impersonata*, or to shew by whom he was presented, and then traverse the presentment alledged. *Hob.* 321. Yet the other way is sufficient on a general demurrer. *Id.*

By common law the incumbent or bishop shall not plead to the right of patronage; for every one ought to plead apt matter, and he has nothing in the patronage. 5 *Com.* Dig. 282.

Yet by the *stat.* 25 *Ed.* 3. c. 7. To avoid feint pleading in the patron, the archbishop, bishop, &c. and possessor may counterplead the title of the king.

And therefore every incumbent instituted and inducted may plead to the right of advowson. 7 *Co.* 26. 4. *Hob.* 319. So an incumbent by collation. *Hob.* 319. So, if he be instituted;

tuted; for by institution the church is full against a common person; and the *stat. 25 Ed. 3. c. 7.* by equity extends to common persons. *7 Co. 26. a. Dy. 1 b. in marg.* Otherwise, if he was only presented. *R. Dy. 1. b.* Or, in the case of the king, was only instituted. *Hob. 319.* For he must in the case of the king, be inducted.

Or, if after institution he resigns, or is created a bishop, pending the writ. *Dy. 1. b. in marg. Hob. 319.* But the incumbent shall not only counterplead the king's title, but shall also make title to himself. *Hob. 319. Vide infra.* And must shew himself possessor. *R. Dy. 293. a.*

By the *stat. 25 Ed. 3. c. 7.* An archbishop, or bishop, who collates by *lapse*, may make title to the patronage in a *quare impedit* brought by the king. *Hob. 318.* So in a *quare impedit* by a common person, who is not the rightful patron, where the bishop presents by *lapse*. *Hob. 319.*

But an ordinary, who has not collated by *lapse*, cannot plead to the right, since the *stat. 25 Ed. 3.* any more than by the common law. *R. Id. & Ion. 5.*

In *quare impedit* the defendant is actor, and may have a writ to the bishop, if judgment is for him, as well as the plaintiff. *Vaug. 7.* And when the defendant is actor, and requires a writ to the bishop, he must make a title in himself, as well as the plaintiff. *Id.* And therefore he must alledge a title to the advowson. *Id. 8. Vide ante, No. 4.* A presentation in himself, or another under whom he claims. *Id. 7. Vide ante, No. 5.*

But where the defendant has presented, and his presentee is instituted and inducted, so that a writ to the bishop for him is not necessary, he is not then regarded as an actor. *Vaug. 7.* And therefore, if the defendant controverts the title alledged by the plaintiff, and does not stand upon his own title, he may alledge a title *pro formâ*, and that his clerk is inducted, without alledging a presentment in himself. *R. Vaug. 8.*

If the defendant demurs to the plaintiff's count, which is adjudged insufficient, the defendant shall have a writ to the bishop, without making title. *Dy. 24. b.*

In a *quare impedit* by the king, if the defendant shews a lease by the king's ancestor to *A.* and that during his possession *B.* presented him, it is sufficient, without shewing a title in *B.* for he shews the estate out of the king. *R. 1 Leo. 45.*

If the defendant traverses the title alledged by the plaintiff in his count, the traverse must be of a matter not only inconsistent with the defendant's title, but which also destroys the

the plaintiff's title, if it be found against him. *Vaug.* 8. As, if the plaintiff alleges seisin of an advowson in gross and a presentment in himself, and the defendant alleges seisin of it as appendant, he ought not to traverse the seisin in gross, though it be inconsistent with the defendant's title; for if he presented, though by usurpation, he has a title, whether the advowson be appendant or in gross. *5 Com. Dig.* 283.

So he ought not to traverse the seisin of the advowson. *Vaug.* 12.

If he alleges seisin of the advowson as appendant, and a presentment, without saying that he presented to it as appendant, he cannot traverse the appendancy. *R. 1 And.* 270. *Vaug.* 15.

But if the plaintiff alleges seisin of the advowson as appendant, and a presentment to it as appendant, the defendant may traverse the appendancy, or the presentment, for the one or the other destroys the plaintiff's title, if it be found against him. *R. Vaug.* 15. *R. 1 Leo.* 154.

So, if the plaintiff alleges seisin of it, as appendant, and a presentment by the king by *lapse*, and the defendant says, that the king was seised in gross, and presented, he ought to traverse the appendancy. *Vaug.* 13. So, if the defendant alleges appendancy to other lands, &c. *Vaug.* 12.

So, if the plaintiff alleges seisin in gross, and the defendant claims as an appendant, he ought to traverse, that it is in gross. *Keil.* 51. *b. Semb. Keil.* 91. *a.* Though *there R.* that he may traverse the seisin in gross, or the presentment.

If the plaintiff alleges a vacancy by the death, resignation, or deprivation of the former incumbent, and the defendant alleges an avoidance by other means, as by a simoniacal contract, &c. he must traverse the avoidance by death, &c. and not the seisin, appendancy, &c. *Vaug.* 16. So if the plaintiff alleges a vacancy by death, and the defendant alleges an avoidance by plurality, by which it belongs to the king by *lapse*, he ought to traverse the avoidance by death. *Semb. Sav.* 78.

If the defendant by his plea shews a title subsequent to the plaintiff's title, he need not traverse it; for he confesses and avoids. As, if the defendant alleges a seisin and presentment subsequent to the presentment alleged by the plaintiff. *Vaug.* 16. If the defendant alleges a seisin and presentment by the king, and the plaintiff by his replication alleges a grant by the king to him, and a presentment by the grantee, and upon his death a presentment of the king by

by lapse, &c. this avoids the presentment by the king. *R. Ion. 12.*

On *quare impedit* by the king, for the next turn of a living void by promotion; if the defendant confesses and avoids by pleading that the crown presented *A.* who is since dead, and himself now presented, and parson imparsoned, he need not traverse that the church is vacant by the promotion; if he does, it may be passed over and issue taken on the avoidance. *Stra. 837.*

If the bishop pleads that the king made *A.* dean of, &c. whereby he became possessed of the church in question, he must shew that the church is a member of the deanery. *Ibid.*

Subscribing the articles need not be averred in the plea, nor in the declaration. *Ibid.*

10. Replication.

If the plaintiff replies to the defendant's title, it is not sufficient to destroy the defendant's title, without maintaining his own title. *Vaug. 60.* Though the king be plaintiff. *R. Vaug. 61.*

But where the king's title appears (being found by office or other matter of record) there the king may relinquish his title, being established by record, and traverse the defendant's title. *Vaug. 62.*

If a bishop pleads, *nothing but as ordinary*, and dies, another defendant may suggest his death on the roll, and pray that the plaintiff may reply, and if he be nonsuited, it shall be peremptory. *R. Salk. 559.*

11. Judgment in *Quare Impedit.*

In a *quare impedit* by the king, the *Attorney General* may enter a *nolle prosequi*, upon which there shall be judgment, *quoad* defendants *eant sine die.* *Townsh. Ind. 177, 8.* So, if there be judgment against the king upon a verdict of demurrer. *Id. 179.*

If the plaintiff is nonsuited, it is peremptory, and the defendant shall have a writ to the bishop. *1 Brownl. 161.* And if any defendant bars the plaintiff his action fails. *Id. 161, 2.*

In *quare impedit* by the king or a common person, if the ordinary claims nothing but as ordinary, there shall be judgment.

judgment against him with a *cessat executio quousq*; &c. *Hob.* 198. *Vide ante No. 9.*

If the plaintiff does not accept his disclaimer, but maintains him to be a disturber, and he is found so, there shall be judgment, and the ordinary will be subject to answer damages. *Hob.* 320.

If it is found against the plaintiff he shall be barred, and cannot have judgment, or a writ to the bishop. *Id.* Though the bishop collated by *lapse pendente lite*, and so the clerk collated shall not be removed. *Id.*

If the patron and incumbent confess the action, or *nil dicunt*, &c. there shall be judgment for the plaintiff, and a writ to the bishop. So if a judgment be given against them upon demurrer. 5 *Com. Dig.* 284.

If a verdict in *quare impedit* be found for the plaintiff, the jury ought to enquire *ex officio* of four points, viz. 1st. Whether the church be full. 2d. Of whose presentation. 3d. Of the value of the church. 4. How long vacant. *Keil.* 57. b.

And this since the *stat. Westm.* 2. c. 5, not by the common law. *Hob.* 318.

So there shall be a writ of inquiry upon a judgment by default or upon demurrer, to enquire of those four points. *Dy.* 241. b. Or, after a verdict, if the jury omit it. *Townsh. Jud.* 191. *Dy.* 135. a. And till this is executed, the writ to the bishop stays. 1 *Brownl. Ent.* 327.

An inquisition which finds the church full of the presentation of a stranger, does not hurt. *Dy.* 77. a.

After a verdict before justices of assize, by the *stat. Westm.* 2. c. 30. *stat.* 12. *Ed.* 2. c. 4. 14 *Ed.* 3. c. 16, the justices may give judgment immediately, and award a writ to the bishop. Or it may be given in C. B. And error may be to the judges of assize, or to the judges of C. B. 5 *Com. Dig.* 258.

If judgment be given for the plaintiff to recover his presentation, execution shall be by a writ to the bishop. *Id.* *Vide post. No. 12.*

If it be given for damages, as it may by the *stat. Westm.* 2. c. 5. Execution shall be by *Fi. Fa.* or *Elegit.* 1 *Brownl.* 158. But not by *capias ad satisfaciendum.* *Id.*

If in a *quare impedit* between common persons a title appears for the king, judgment shall be given for the king, and a writ to the bishop for the king's clerk. So in a *quare impedit* by the king, if the issue be whether the king is seised of the advowson of B. and it is found, that he is seised

seised of two turns, and the bishop of the other turn, and it appears to be the king's turn, there shall be judgment for him.

But if a title for the king appears by the defendant's plea, there shall not be a writ for the king's clerk, without the plaintiff's confession of his title upon record. 5 Com. Dig. 285.

Judgment by the common law was only for recovery of the presentation, and a writ to the bishop. 5 Co 58. b.

By the *stat. Westm. 2. c. 5*, the plaintiff shall also recover damages. *Id.* But since the statute, the plaintiff may waive the benefit of it, and take his judgment at common law. *R. 5. Co. 59. a.*

12. Writ to the Bishop.

After judgment in *quare impedit*, the plaintiff or defendant for whom the judgment is given, shall have a writ to the bishop to admit his clerk, if he be not before instituted and inducted. *F. N. B. 38. B.* And it shall be directed to the same bishop, who is defendant. *Id. 1 Brownl. 159.* Or, if he be patron, to the metropolitan. *Dy. 35. b.* For it shall be to the one or the other at the plaintiff's election. 5 Com Dig. 285. Or, if the bishop is absent, or out of the realm, to the guardian of the spiritualities. *Dy. 77. a 350. a.*

If the Archbishop of Canterbury is plaintiff, it shall be to the Archbishop of York. *per Holt, Sho. 329.*

It may be to the archbishop upon a judgment in *quare impedit* in Wales; for it is within his province. *R. Jones 332.*

But the defendant shall not have a writ to the bishop, if the *quare impedit* abates for form. *F. N. B. 38. H.* So, if the patron makes default to the *disfringas*, he shall not have it, though it abates by the incumbent's plea. *Id. Semb. Cont. Bend. pl. 136, 207.*

So, if a *quare impedit* abates for form, *misnomer*, or insufficiency. *Id. M. R. 7 Co. 27. b.*

If the sheriff returns *quod quer' non invenit pleg'*, upon which the plaintiff finds pledges in C. B. and has another writ, and the sheriff returns *tarde*, if the defendant appears, and the plaintiff makes default, the defendant shall not have a writ to the bishop, because the *quare impedit* was never served upon him. *F. N. B. 38. O.* So the defendant shall not have a writ to the bishop, where he claims as par-

parson *imparsonee*. *Id. L.* where there is another *quare impedit* depending against him for the same church. *Id. R.*

So, if the plaintiff is nonsuited, the defendant shall not have a writ to the bishop before title made. *Id. K. Rast. in 2. Imp. Evesq. 2.*

Otherwise, where the defendant has judgment upon demurrer to the declaration. *Dy. 24. b.*

So, the plaintiff shall not have a writ to the bishop before he has counted, though all make default but the bishop. *F. N. B. 38. I.* So the king shall not have a writ to the bishop upon default, till title made. *Salk. 559.*

But the plaintiff shall have a writ to the bishop, without making title, if the defendant makes default upon the *distringas*. *Id. N. Semb. Cont. 1 Brownl. 158. Vide ante, No. 1.*

If a writ is awarded to the bishop, he shall admit the clerk of the party, and remove all who were admitted *pendente lite*. Though admitted upon the presentation of a stranger. *5 Com. Dig. 286.*

Or upon a presentment by the king. *Id. cites cont. Dy. 260. a. But it is there said that this opinion was not law. R. by 3 I.* that the presentee of the king or a stranger *pendente lite* shall not be removed without a *scire facias*. *2 Cro. 93.*

If the plaintiff is outlawed after judgment, and the king presents by reason of the outlawry, and then the outlawry is reversed, the plaintiff shall have execution upon the first judgment, and by writ to the bishop shall remove the king's presentee. *R. by 3 I. Periam Cont. Sav. 89.*

If the ordinary does nothing upon the first writ, there shall be an *alias* directed to the bishop, which may be returnable, and upon this an attachment. And the ordinary returns the writ *quod admisit*. *5 Com. Dig. 286.*

Or he may return *quod non est idonea persona*, shewing how. *Semb. Dy. 254. b. Br. Iud. 9.*

That the clerk did not request to be admitted. *R. Keil. 71. b.*

But, if the incumbent, of whom the church is full, be not a party to the writ, he shall never be removed. *Co. Lit. 344. b.*

If the bishop refuses admittance upon a writ to him, an *alias*, *pluries*, and attachment lie against him. *F. N. B. 38. C. 47. C.* And there was a fine of 10*l.* for a bad return of the first writ, and an *alias* under the penalty of 100*l.* *3 Leo. 139.*

Or the party may have a *quare non admisit*, and recover his damages. *F. N. B. 47. C. 21 H. 7. 8. b. A quare non admisit*

admisit shall be sued in the county where the refusal was. *F. N. B. 47. F.* And out of *C. B.* in term, where the recovery was, *Id. 47. C.*

It may be sued by the king in *B. R.* though the recovery was in *C. B.* *Id. D.* Or by a common person, if the record was removed there by error. *Id. E.*

So, it may be sued out of *chancery*, in term-time, or vacation. *Id. C.* And it lies, if the bishop refuses, though he afterwards admits the clerk. *Id. L.*

But the plaintiff shall not have his clerk admitted upon a *quare non admisit*; for it is only to recover damages. *Id. G.* And the bishop may plead that the church is full of the presentment of such an one, not party to the recovery. *Id. K.*

V. *Juris Utrum.*

When it lies.

A *juris utrum* is the highest writ a parson can have. *F. N. B. 48. R.* And it lies, where the lands and tenements of a rectory are aliened by the predecessor of the parson. *Id.* Or are recovered against the predecessor by verdict, or by confession or default, without praying in aid of the patron and ordinary. *Id. E. 49.* So, if the predecessor be disseised of his lands or tenements. *Id. 49. A.* Or any intrudes upon them after the death of the predecessor.

A dean and chapter, prebendary, vicar, &c. being *parson imparsonne* of a church, shall have a *juris utrum*. *Id. M. N. O.*

QUARE INCUMBRAVIT.

I. When it lies.

If the plaintiff in a *quare impedit* sues a *ne admittas* within six months, and afterwards recovers, and before judgment the bishop had instituted another to the church, he shall have a *quare incumbrauit* against the bishop, and shall recover his presentation and his damages. *F. N. B. 48. I. O.*

So every party, who sues a *ne admittas*, may have a *quare incumbrauit* after his recovery, if the church be full by the presentation of another. Though the bishop admits the presentee of him, who is found patron, by a *jure patronatus*.

F. N.

F. N. B. 48. H. Or, if the bishop admits the clerk of a stranger, as well as of the party to the writ. *Id. L.* Or admits after six months, as well as before. *Id.* Though the bishop presents the clerk of the plaintiff. *5 Com. Dig. 345.*

A *quare incumbavit* lies, if the bishop incumbers, when *no quare impedit* is pending, and no debate for the church. Or, before judgment given. *Id.*

II. *How the Proceedings shall be.*

The *quare incumbavit* is an original writ, which issues out of *Chancery*, and not out of the court where the recovery was. *F. N. B. 48. G.* And it ought to be sued in the county where the church is. *Id. D.* And in the court, where the recovery was, if the record remains there. *Id. F.*

But the king may sue a *quare incumbavit* in *B. R.* though the recovery was in *C. B.* *Id. E.* So a common person, if the record be removed there by error. *Id. F.*

The process shall be an *alias*, and then a *distringas*. *Id. P.*

The plaintiff in a *quare incumbavit* ought to mention his recovery in his writ, and count, *per meliorem opinionem*. *Id. K.* Or, if there be no recovery he may have a special count. The defendant may demand *oyer* of the recovery mentioned in the count. But the plaintiff in his count need not say, where he recovered. Or, whether he recovered since or before the six months. Or, that the bishop refused his clerk; for if he incumbered, it imports it. *5 Com. Dig. 346.*

If the plaintiff be nonsuit, he may have another *quare incumbavit*, and vary his count. *F. N. B. 48. M.*

The defendant may plead, that he did not incumber since the prohibition delivered. *Id. N.*

III. *When it does not lie.*

None shall have a *quare incumbavit* except after a recovery in a count. *F. N. B. 48. E.*

Nor, if a church be incumbered before a *ne admittas* sued. *Id. H.*

So a *quare incumbavit* does not lie, if the bishop after the six months, collates by lapse. *Id. L.* Nor doth a *quare incumbavit* lie, if the bishop incumbers pending a right of advowson, though the plaintiff recovers: for the plaintiff in a right of advowson cannot have a *ne admittas*; for he recovers the advowson only, and not the presentation. *Id. Q.*

Q U A R E

QUARE NON ADMISIT.

I. *When it lies.*

After a recovery in a *quare impedit*, if the bishop refuses to admit the clerk of the plaintiff, he shall have an *alias*, *pluries*, and attachment, or at his election a writ of *quare non admisit*; in which he shall recover damages only for the refusal. *F. N. B. 47. C. G.*

It lies upon a recovery by the king, as well as by a common person. *Id. C. D.* And it may be sued out of *Chancery*. *Id. C.* Or out of *C. B.* which, in term, is most proper. *Id.*

It lies against a bishop, upon a refusal by a vicar general. *Id. I.* So, upon his refusal, though he afterwards admits him. *Id. L.*

So it lies against the guardian of the spiritualities, upon a refusal by the bishop then dead. *Id. I. Qu.?* Or against the official of the bishop. *Id. N.*

A *quare non admisit* shall be sued in the county where the refusal was. *Id. F.* And by a common person in *C. B.* or, if the judgment be affirmed in error, in *B. R.* *Id.*

But by the king it may be in *B. R.* as well as in *C. B.* though no error brought. *Id. D.*

The writ ought to recite the recovery. *Id. C.*

II. *When it does not lie.*

This writ does not lie against an archdeacon for refusal of induction; for the plaintiff shall cite him into the spiritual court, or have an action upon the case. *F. N. B. 47. H.* Nor upon a recovery of a presentation to a donative; for he shall have a writ to the sheriff to put him into possession. *Id. 48. A.* Or a writ to him, who ought to install, &c. the presentee to the donative, to put him into possession. *Id. C.*

It will be a good *plea* for the bishop, that the church is litigious. *Id. P.* That the church is full of another presentation by any one not party to the record. *Id. 47. K.* That he himself presented by lapse. *Id. M.* That he has admitted his clerk. *Id. H.*

QUO WARRANTO.

I. *When it lies.*

A *quo warranto* is in the nature of a writ of right for the king against him who usurps or claims any franchises, or liberties, to say by what authority he claims them.

A *quo warranto* lies for all franchises. As, for waifs, estrays, goods and chattels of felons, deodands, fines, amerciaments, issues. A park, or warren. For wreck of the sea. For taking lastage, or ballastage of ships, &c.

So it lies for franchises, which cannot be seised into the king's hands; for the party may be ousted of them. As, for a court baron. A court-leet, or borough court. A fair, market, toll, &c.

So it lies for claiming to be a corporation. To chuse bailiffs or other officers. Coroner, constable, clerk of a market, justice, &c.

So it lies upon a claim of exemption; as to be exempt from the government of the mayor, justices, &c. Vide various precedents, respecting the several points above, in *Fo. Ent. Vide 5 Fem. Dig. 351, 2.*

A *quo warranto* lies against him, who abuses his franchises, or liberties. 2 *Inst. 496.*

So it lies upon claim of the correction of others: as, to have the assize of bread and beer, weights or measures. To have a prison, power of arresting, &c. The punishment of forestallers, or other offenders. *Fo. Ent. 528. a.* So pillory, tumbrel, &c. *Id. 551. b.*

It lies for exercising the office of steward of a court-leet, but not of a court-baron. *Stra. 621. Vide post. Div. II.* It lies for the office of constable. *Stra. 1213.*

It lies where any new jurisdiction, or a public trust, is executed without authority, though it is no usurpation upon any franchise of the crown. *Stra. 2. 299, 836. L. Ray. 1559.*

The king may have an information in the nature of a *quo warranto*, 5 *Fem. Dig. 351.* Or a writ of inquiry out of the Exchequer. *Co. Ent. 530. b.*

An information in the nature of a *quo warranto* lies against any one claiming an *exclusive* ferry over a public river, but not for taking money of passengers. *Stra. 1161.*

II. *When*

II. *When it does not lie.*

By the *stat.* of 18 *Ed.* 1. of *quo warranto*, every one who had a franchise before the time of *R.* 1. and can prove his enjoyment afterwards, by verdict, or other means; his franchise, &c. shall be confirmed.

And therefore, if it appears upon a *quo warranto*, that the defendant hath enjoyed time whereof, &c. franchise, &c. which lie in prescription, or those, which lie in charter, by grant within the time of *R.* 1. or, if granted before, if they be confirmed or allowed since, he shall not be ousted of them. 2 *Inst.* 495. 9 *Co.* 28.

A *quo warranto* does not lie for erecting a warren. *Stra.* 637. 2 *L. Ray.* 1409. Nor for a forfeiture by non-attendance. *Stra.* 819.

The court will not grant an information *quo warranto* for making a rabbit-warren, nor for setting up a fair; the remedy is, by application to the attorney-general, who may grant it. *B. R. H.* 261. Nor for holding a court-leet in a manor; for it is a private right, and may be tried in a civil action. *Andr.* 14. *Vide ante, Div I.* Nor where two sets of churchwardens are sworn in. *Stra.* 1196. Nor where the defect of the defendant's title is stale, as of twenty-nine years standing, and has never been questioned before. 1 *Burr.* 433.

III. *The proceeding in a Quo Warranto.*1. *In what Court shall it be.*

By the statute made 6 *Ed.* 1. (but proclaimed 30 *Ed.* 1. and therefore printed of that year. 2 *Inst.* 279.) All persons ought to enjoy their franchises, if not usurped over, 'till the coming of the king, or justices in *Eyre*.

And thereby, and by the *stat.* 18. *Ed.* 1. when justices in *Eyre* were in being, a *quo warranto* lay before them. 2 *Inst.* 498.

2. *What Process.*

By the *stat.* 6 *Ed.* 1. (printed 30 *Ed.* 1.) The sheriff shall make proclamation forty days before the *Eyre*, that all appear to shew *quo warranto* they claim their franchises; and if any makes default, his franchise shall be seised into the king's hands, 'till he appears, *nomine districtionis*, and then replevied, if he answers immediately. If he excepts, that

he ought not to answer without an original, it shall be inquired, whether he himself usurped; and if found so, he shall answer immediately, without an original: if found that his ancestor died seised of the franchise, an original shall be sued in this form; *Rex, &c. sum' per bonos summonitores A. quod sit, &c. ostensurus quo warranto tenet, &c.*

If *A.* appears upon the original he shall answer, and replication, and rejoinder, shall be made by the *same statute*. If he does not appear, nor is effoined, it shall be as in *Eyre*. By the *same statute*. And therefore, the first process against the defendant in a *quo warranto* is summons. 1 *Sid.* 86.

If he does not appear thereon, judgment shall be for seisure. *Id.* and 2 *Rol.* 46.

So, in an information in the nature of a *quo warranto*, the first process shall be a *venire facias*. 5 *Com. Dig.* 353.

If he does not appear upon the *venire facias*, there shall be a *distringas*. 1 *Sid.* 86. 1 *Salk.* 374.

If the party does not appear the same term, he shall lose his franchise for ever. 2 *Inst.* 282 If he appears, his franchise shall be replevied of right. *Id.*

If an information be against a corporation, the first process shall be summons, and afterwards *distringas in infinitum*. *Carth.* 503. And fifteen days are sufficient between the *teste* and return. *Id.* If there be no appearance upon the *distringas*, the issues may be estreated. *R. Id.*

Upon an inquisition returned into the *Exchequer* of an usurpation of franchises, a *distringas* shall issue against the usurper, who thereupon may appear and plead. *Co. Ent.* 531.

If an usurpation be by a corporation, process shall be against them by their corporate name. *Vide* the case of the *quo warranto* against the city of *London*, 16, *Treby's Argument*. *Vide infra*, No. 3.

If it be for usurping to be a corporation, it shall be against the natural persons who usurp, or by a name which comprehends them. *Vide Id.* 4, 15. *Treby's Argument*. *Id.* 69 *Pollexfen's Argument*. *Vide infra*, No. 3.

3. Information.

The general proceeding is by information for the king, by his attorney-general, against any usurper of franchises, &c. to shew *quo warranto*, he uses them. *Co. Ent.* 527. *b.* So against him, who exercises a power unlawfully: as if a mayor

mayor, &c. admits to freedom persons who have no right; for there is no other remedy. 1 *Salk.* 374.

By the *stat. 9. Ann. c. 20.* An information in the nature of a *quo warranto* may be granted by leave of court, at the relation of any desiring to sue, against any who intrudes into, usurps, unlawfully holds, or executes any offices, or franchises of a corporation.

Where the rights of several persons may be tried in one information, the court may order one against several persons. After rules are made absolute for four informations against four defendants, the court may direct that there shall be only one information against all the four defendants. 1 *Burr.* 573.

If an information be for using a franchise by a corporation, it ought to be against the corporation. 2 *Rol.* 115. If for usurping to be a corporation, it ought to be against the particular persons. *Id. Vide supra, No. 2.*

Whether B. R. can grant it on the application of a private person, for usurping a market upon the crown. *Dub. Rex v. Marjden, M. 6 Geo. 3. 3 Burr.* 1812. But the court will not grant it for *encouraging and promoting* a market *Ibid.*

Information on the 9th *Ann. c. 20.* lies not against a corporation as a body, but only against individuals usurping franchises in a corporation. Information against a corporation is always by the attorney-general. 2 *Burr.* 869.

If it does not appear whether a court, at which an election was made, was competent or not, the court will grant an information; or where any other material points are doubtful. 3 *Burr.* 1485.

4. Plea.

By the *stat. 9 Ann. c. 20.* The defendant shall plead the same term the information is exhibited by that statute, unless the court gives further time.

The defendant may disclaim the liberties mentioned in the information. *Co. Ent.* 527. *b.* Or disclaim as to part, and justify as to the other part. *Id.* 529. *b.*

After plea, the defendant may amend his plea, paying costs, before demurrer joined. 1 *Sid.* 54:

The defendant in a *quo warranto* may by plea shew his title to the liberties claimed. And in such case he ought to shew a full title to himself. As, if the the king grants *bona felonum*, or other franchises, which lie in grant, to an abbot,

&c. whose possessions came back to the crown, and the king re-grants *bona felonum*, &c. *adeo plene prout abbas habuit*; in a *quo warranto* against the grantee, the defendant ought by his plea to shew the first grant to the abbot, the re-union in the crown, and afterwards the re-grant, &c. 5 Com. Dig. 354.

If he pleads the king's charter, he ought not to plead, that he granted, and confirmed; for that is double. 1 Sid. 86. *Sed. qu. de hoc*, if the words of the grant are pursued?

If he pleads a grant of an office, he ought to shew it to be an ancient office. *Semb.* 1 Sid. 86. He ought to alledge the thing done, to be appurtenant to his office. *Id.*

If he pleads a grant to an abbot, &c. he ought to shew, for what estate. *R. Mo.* 297.

If he shews a privilege to him as a copy holder, he ought to plead it in him, who has the freehold at last. *R. Yelv.* 191.

But it is sufficient, that the plea be as general as the information; as if *quo warranto* be for using a market, toll, &c. it is sufficient to make title to the market, toll, &c. without saying how much the toll was. *Palm.* 81.

If he claims a franchise as appendant to a manor which came to the king by the attainder of *B.* and afterwards was granted to him; it is sufficient to say, that *B. was in due manner attainted.* *Semb.* 3. *Leo.* 72.

If he claims franchises by prescription, and others by charter, he may conclude, *eo warranto utitur*, generally; for it shall be taken *distributive.* *R. Mo.* 298.

If the affidavit annexed to a plea in abatement, has no title, the plea shall be set aside. *Stra.* 1161.

5. Judgment.

In a *quo warranto*, there shall be judgment immediately for the king, if the defendant disclaims. *Co. Ent.* 527. *b.*

If the king cannot have the franchise claimed, judgment shall be that the defendant be ousted of it. 5 Com. Dig. 354.

So, in an information for using an authority to which he has no right. 1 *Salk.* 374.

If a franchise, or liberty, which may subsist in the crown, be forfeited, the judgment in a *quo warranto* for it, either for seising, or ousting will be proper, *per Holt, Show.* 280: If the franchise was created by the king, and may subsist, &c. the judgment for seisure will be the most proper. *Ibid.*

So

So judgment shall be, for seifure in the king's hands, in a *quo warranto* for a franchise not granted by the king. 1 *Salk.* 374.

If judgment be for seifure of the franchise, all franchises incident, or subordinate, granted by the same charter, are also forfeited. *R. Pal.* 82.

By the *stat. 9 Ann. c. 20.* If the defendant, on information pursuant to that statute, be found guilty of usurpation, intrusion into, unlawful holding, or executing any offices or franchises there named, the court may give judgment of *ouster*, as well as *fine*, and costs shall be recovered on either side.

If the defendant be found duly elected, but not sworn into the office, there shall be judgment of *ouster*. 2 *Mod. Ca.* 234. *Str.* 582. And no *mandamus* lies to swear, till that judgment be reversed. *Ibid.*

If the Attorney General confesses the defendant's plea, there shall be judgment for the allowance of the franchises, 5 *Com. Dig.* 354. But a confession by the Attorney General does not bind the king, where the matter is not private, but concerns the public. 1 *Rol.* 12. So a confession by the Attorney General, if it be not after a plea upon record, does not warrant the court to give judgment against the king. *Semb. Sav.* 19. So a confession by the Attorney General does not conclude the king, or the court, in a point of law; but only as to the fact. *R. Bul.* 296.

If the defendant confesses usurpation for part of the time only, and from thence insists on election, there cannot be judgment of *ouster* but only *capiatur pro fine*. *Str.* 952.

6. The effect of the Judgment.

The judgment in a *quo warranto* is final; for it is in the nature of a writ of right. 1 *Sid.* 86. And therefore, if judgment be against the king, the king shall be for ever bound, as to the thing adjudged. 1 *Rol.* 112. So, if the judgment be against the king upon a confession by the Attorney General, it shall never afterwards be re-examined for a matter in fact; for as to the fact it is conclusive, though not as to the law, *Hardr.* 129.

Upon a judgment against a corporation for seifing of their liberties, the corporation shall not be seised, or dissolved. 4 *Mod.* 58.

There

There cannot be a judgment against a corporation, but in their politic capacity. *Id.*

7. Execution.

After judgment for seizure of liberties into the king's hands, a writ of seizure shall issue to the sheriff. *Co. Ent.* 539. *b.* And thereon the sheriff shall return a seizure. *Id.* 540. *b.*

R E P L E V I N.

I. For what Things it lies.

A replevin lies, when cattle or goods are distrained, and impounded, and thereby the sheriff is commanded upon pledges to deliver them to the owner. *Co. Lit.* 145. *b.* And replevin may be made by writ, or by plaint; by writ at the common law; by plaint upon the *stat. Marl.* *Id.*

Replevin lies of all cattle, goods and chattels, unlawfully taken.

If cattle are taken *damage feasant*, and detained after sufficient amends, he may have replevin for the wrongful detainer. *F. N. B.* 69. *G.*

If a cow distrained has a calf, replevin lies of the calf. *Id.* *D. & Dalt.* 65.

Replevin lies, though there be an express grant, that the party may distrain, and hold the goods against pledges, 'till the rent be paid; for goods cannot, by grant, be made irrepleviable. *Co. Lit.* 145. *b.* *Vide Post. Pleading in Replevin.* No. 3.

This last case, is well worthy of notice.—I trust the reader will excuse me, for making a few observations, by way of comment upon the above sound doctrine. The law of the land cannot be altered by the contracts, or conduct of individuals, nor can *third* persons be affected by the contracts or conduct of others, notwithstanding some very *peculiar* opinions lately given.

I shall not enlarge on the subject. I do not mean to give offence. The man of sense, and the man of experience, will understand me.

As I seem to impugn some late doctrines, I think it incumbent on me to say, they seemed founded in justice and equity, though

though (in my humble opinion,) contrary to the ancient, and well known law of the land.

Perhaps some of our judges, may, in their great zeal to administer *equal justice* to all, forget that their duty is to *declare* the law, as then existing; and although the law may, in some instances, *appear*, even contrary to the principles of justice and equity, yet they, (the judges) cannot *alter* the law.

It is only the *legislative* power, *i. e.* the king, lords and commons, in parliament assembled, that can *alter* the law.

If the judges left at liberty to give such glosses, explanations, and constructions, as they shall think proper, we shall no longer be a *free* people. We shall no longer be governed by laws, made by the *sovereign* power, but by the *dicta* of judges, appointed by the crown, *i. e.* the king, who in one respect, is *only* the *executive magistrate* of the state; in another (when sitting in parliament,) *only one*, of the three estates of the realm.

Upon this occasion I trust the reader will excuse me, for giving a translation of a few lines, from a very excellent foreign author, being observations against the common maxim, "that the judges must consult the *spirit of the laws*." Although his observations relate to the *criminal*, I think them equally applicable to the *civil* law.

"The authority to interpret penal laws, cannot reside with the judges, because they are *not* legislators.—There is not any thing more dangerous than the common axiom, that we must consult the spirit of the laws. It is breaking down the dam opposed to the torrent of opinion. I think I have demonstrated this truth, which may seem a paradox to vulgar minds, more struck with a little present disorder, than with the fatal, but remote consequences which arise from a false principle, that hath taken root in a nation. Our knowledge and all our ideas, have a reciprocal connection; the more complicate they are, so much more numerous are the ways of arriving at, or deviating from the truth. Each man hath his different point of view, and which varies in each, at different times. The spirit of the laws will therefore be the result of the good or bad logic of the judge; of a sound or unsound digestion; it will depend on the violence of his passions; on the weakness of him who suffers; on the relation between the judge and the prosecutor; and on all those minute powers, which change the appearance of every object, in the fluctuating mind of man: Hence we see the fate of a citizen oftentimes changed in his passage from one tribunal to another; and

and the life of a miserable being a victim to the false reasoning, or the ill humours of a judge, who takes for a lawful interpretation, the vague result of all those confused series of notions which float in the human mind. Hence we see the same crimes in the very same tribunals, differently punished at different times, because they did not consult the constant and fixed voice of the laws, but the wandering instability of interpretation."

"A disorder, which arises from the strict observance of the letter of a penal law, is not to be put in comparison with that which arises from interpretation. Such a momentary inconvenience should induce the legislature to make the necessary correction, in the words of the law, which are the cause of the uncertainty, but the fatal licence of reasoning, from whence arise arbitrary and venal controversies, should be prevented." *Beccaria*. § 4. *Harlam Ed.* 1780.

II. By whom Replevin lies.

He who brings a replevin, ought to have the property of the cattle, or goods, in him. *Co. Lit.* 145. b. But a special property is sufficient. *Id.* As, if goods be in his custody as a pledge, or for the manuring of his land. *Ibid.*

An husband may have replevin, for the goods of his wife, taken *dum sola*. *F. N. B.* 69. K.

An executor or administrator, for the goods of the testator, &c. *1 Sid.* 81.

III. Against whom Replevin lies.

Replevin lies against him who takes the goods. And also against him who commands the taking; as well as trespass. *R. 2 Rol.* 431. l. 5. Or against both together. *Ibid.*

So, it lies against him who takes *damage feasant*, if he detains after amends tendered.

If there be a dispute upon the seizure of cattle in an highway, upon which application is made to *A.* a stranger, who permits *B.* (upon security given to him to return the cattle to the person who has right) to depasture the cattle in the mean time, 'till the contest is determined, and thereupon the servants of *A.* seize the cattle for the use of their master; replevin does not lie against *A.* and he may plead *non cepit*. *R. 1. Leo.* 42. So, if he stays the cattle, passing through his manor, 'till the contest be determined. *Godb.* 113.

So replevin does not lie against him, who takes goods beyond sea, though he afterwards imports the goods hither. *per. Pol. Sho.* 91.

IV. When a Replevin does not lie.

A replevin does not lie for goods taken in execution. Nor for goods seized for a debt to the king, without command of the king, or of the barons of the exchequer. *Mad.* 672.

But a replevin lies against the king, if goods be in his hands. *per Hide*, to the lords. 3 *Rush*, 1361.

A replevin does not lie for goods seized by warrant of a justice of peace, upon a conviction for destruction of the game, *Semb.* 2. *Mod. Ca.* 208, 9. I conceive there is not a doubt on the subject. 'Tis in the nature of an execution.

A replevin ought not to be made, before pledges found to the sheriff.

By the *stat. Geo. 2. c. 19.* The sheriff is to take a bond with two sureties in double the value, of the cattle or goods, and if there is judgment for the avowant, or person making cognizance, the bond must be assigned to him.

If upon such bond, the plaintiff in replevin does not enter his plaint in the county court, the bond will be forfeited. So if, afterwards, he does not proceed in the prosecution. Or if he be nonsuit, or has a verdict against him. *Carth.* 519.

But if the plaintiff in replevin enters his plaint, and afterwards is retained by an injunction out of *Chancery* till his death, whereby his plaint abates, the bond will not be forfeited. *R. Id.*

Replevin does not lie for goods distrained for a fine imposed on an officer by commissioners of land tax, and if he takes out replevin, it is a contempt, and an attachment will be granted. *Bunb.* 14. So it does not lie for goods distrained on a conviction (for deer-stealing.) *Stra.* 1184. And if the sheriff grants it, an attachment shall go against him. *Ibid.*

On a *scire facias* against the sheriff for not taking pledges, he must plead *ad idem.* *Fort.* 331.

In debt on a replevin-bond, it is a bad plea, that the defendant appeared at the county-court; he must follow it, wherever removed to the end of the cause. *Id.* 361. So that he performed all conditions, is a bad plea; he should plead, he did indemnify. *Id.* 210.

If a debt is brought on a replevin-bond, for not prosecuting in the county-court, with effect, and defendant pleads he did then

then and there prosecute with effect, and plaintiff replies, he (the present defendant) removed it by *recordari* into C. B. and was there non-suited, the replication is well. B. R. H. 137.

If plaintiff be non-suited, before avowry or cognizance, action on the bond, must be in the sheriff's name,

Pleading in Replevin.

1. *Process.*

By Writ of Replevin.

If a man tortiously takes the person, or goods and chattels of another, and detains them, a replevin lies, upon which the sheriff shall be commanded, upon pledges, to make deliverance of the same person, or goods.

By the common law the person of a man was replevied by writ *de hom. replegiando*, So, by the common law, there was a replevin of cattle or goods by writ to the sheriff.

And replevin should be brought by him who has the property, absolute, or qualified, in the goods. And against him who took, or command the taking, or both. 5 Com. Dig. 287.

If the sheriff himself took them, it shall be against him by his proper name. Reg. 81. b.

If the writ of replevin be for divers sorts of cattle, it shall be *quare averia sua, &c.* F. N. B. 68. D. If only for one beast, it shall be *quare equum suum*, or *bovem suam &c.* Id.

If a live beast, and a dead chattel, are in the same writ, the beast shall be named first. Reg. 81. b.

For what things, and when a replevin lies, *Vide ante* I. IV.

A writ of replevin, is in the nature of a *justicies*. 2 Inst. 140.

If the sheriff does not return, or does nothing upon the writ of replevin, the plaintiff shall have an *alias* replevin. F. N. B. 68. E. And the *alias* usually has this clause, *vel causam nobis significes.* Id. But such clause may be omitted in the *alias.* Id.

If the sheriff does nothing upon the *alias*, the plaintiff may have a *pluries*, which recites the *alias* and contempt upon it, and

and commands that the sheriff make replevin, or that he himself be present to answer the contempt. 2. H. 7. 5. b. And if he things fit, he may have a writ of replevin, *alias*, and *pluries*, all at the same time. F. N. B. 68. E.

If the sheriff makes replevin upon the *pluries*, he does not return the writ; but if he does not make replevin, he ought to return the cause. 2. H. 7. 5. b.

Upon the *alias* the sheriff returns, properly claimed, a writ *de proprietate probanda* issues. Dy. 173. a. Vide post. No. 8.

If the sheriff does nothing upon the replevin, *alias*, and *pluries*, an attachment will lie against him, directed to the coroners, commanding them that they attach the sheriff for his contempt, and in the *interim* make replevin. Reg. 81. So if nothing be done upon the *hom. repleg. alias*, and *pluries*. Id. 78. a.

To the replevin, *alias*, or *pluries*, the sheriff may not return *no cattle taken*. R. Salk. 581. But he may return *that the cattle are esloigned*. Kit. 262. Salk. 581. Or, *dead*. 32 H. 6. 27. b. Or, *that no one shewed him the cattle*. Salk. 581.

And thereupon the plaintiff may have a *capias in withernam* and take so many of the defendant's cattle. So, if upon an *hom. repleg* it be returned *that he is esloigned*, there shall be a *capias in withernam* the defendant. If the defendant appears at the return, he shall be committed, without a *capias in withernam*, 'till he produces the person, and shall not be admitted to plead. 5 Com. Dig. 288.

If A. brings *hom repleg.* for his wife, then *alias*, then *pluries*, to which defendant appears, and then *capias in withernam* issues; it is irregular, and process thereon shall be staid. 1. Wils. 256.

If after defendant's appearance, and before declaration, the wife dies, the court will not on motion, stay proceedings, but plaintiff shall declare, and defendant take what advantage he can by pleading. Id.

Defendant may be bailed on *capias in withernam*, but plaintiff must first declare, and defendant plead *non cepit*; and the bail is for the defendant to appear, and if judgment against him, to render his body, and be in custody, till he render the person, &c. Barnes 59.

Withernam lies upon a replevin by plaint. 9 Ed. 4. 48. b.

If a bailiff, upon a replevin by plaint, returns, *that he could not have a view, to make deliverance*, the sheriff shall inquire by inquest, and if it be found, that he could not have it

it, the sheriff shall award a *withernam*. 1 *Brownl.* 167. And *capias in withernam* lies against the defendant though a peer. 11. *H. 4.* 15. *b.* It is only *mesne* process, not an execution. *Salk.* 582.

The *capias in withernam* recites the return upon the replevin, or *hom. repleg.* *F. N. B.* 69. *B.*

If, upon a *capias in withernam*, or *hom. repleg.* the sheriff returns *non est invent.*, there shall be a *capias in withernam* for the goods of the defendant. *Id.* 68. *C.* 11 *H. 4.* 15. *b.*

If, upon a *capias in withernam*, the sheriff returns *nulla bona que capi possunt*, the plaintiff shall have a *capias* and process to outlawry. *F. N. B.* 74. *D.*

If, upon a *capias in withernam*, or *hom. repleg.* or in replevin, he returns *cepi*, &c. the person or cattle taken, they are irreplevisable. *R. Ray.* 475. 7. *H. 4.* 27. But the parties may appear upon the *withernam*, and count, &c. *D. Dy.* 189. *a.* *R.* *Noy* 50.

If, upon the *capias in withernam*, the defendant pleads *non cepit*, he may be bailed. *R. Salk* 581. *Skin.* 337. And he is not estopped by the return of *Elongat.* to say *quod non cepit*. *R. Salk.* 581. *Skin.* 61, 76, 337. And if the return of *elongat.* be false, after judgment against the sheriff for the false return, the defendant shall be bailed. *Ray.* 475.

If on replevin made by the sheriff upon a plaint in the county court, the bailiff returns that the cattle are esloigned, the sheriff must enquire of it, and if it be so found, the sheriff may award a *withernam* in the county. *F. N. B.* 69. *C.* 74. *C.* 1 *Brownl.* 167. And, if he refuses to do it, there shall be a writ out of *chancery* directed to him to award a *withernam*. *F. N. B.* 69. *C.* And if he does not obey, there shall be an *alias*, *pluries*, and attachment. *Id.*

So *withernam* lies in *second deliverance*. 1 *Brownl.* 167.

If the sheriff refuses a *withernam*, an attachment lies against him, and a *disstringas* directed to the coroners. *Id.* If a *nihil* be returned upon the *withernam*, an *alias* and *pluries* go, and so *in infinitum*. *Id.*

After a *withernam* awarded, if the defendant pays all damages to the plaintiff, he shall have restitution awarded. 5 *Com. Dig.* 289.

It is not a good return for the sheriff upon a replevin *quod mandav' ballivos qui nul' dedit respons.*, or *no deliverance made*; for by the *stat. Westm.* 1. *c.* 17. the sheriff ought immediately to enter the franchise, and make deliverance. *F. N. B.* 68. *F.*

That the cattle are inclosed in a park, fortress, &c. 8 *H. 4.* 19. *a.* 2. *By*

2. By *Plaint*.

By the *stat. of Marl.* 52 H. 3. c. 21. *Si averia capiantur, &c. Vicecomes, post querimoniam sibi factam, ea deliberare possit, si extra liberatis, &c. Et si infra, &c.*

And upon this statute, after plaint to the sheriffs he by *parol*, or precept, may by his bailiff replevy them. And it is not necessary for him to stay 'till the county-court before he makes plaint, if the plaint is afterwards entered there. 5 *Com. Dig.* 289.

And the sheriff ought upon plaint to make deliverance of the cattle, though he himself took them. 2 *Inst.* 139. And the plaint shall be, *quia A. B.* (naming the sheriff's proper name) *cepit. Id.*

So he may make deliverance, though the cattle or goods are above the value of 40s. *Id.* Though after the taking they are conveyed into a franchise. 2 *Inst.* 140. So, if they are taken in a franchise, and upon a precept the bailiff of the liberty refuses, or neglects, to deliver them, the sheriff may enter the franchise and replevy. *Id.* So he may upon a writ of replevin. And therefore, upon a writ of replevin, it is not a good return, that the bailiff of the franchise *nullum dedit responsum*, or the like matter. *Reg.* 82. *F. N. B.* 68. *F.*

The sheriff may take such power for his assistance as he pleases. 3 *H.* 7. 1.

By the *stat. Westm.* 1. c. 17. If the cattle are driven to a castle, or fortress, and there detained against gages and pledges, after demand the sheriff shall make deliverance. 2 *Inst.* 192. So, if they are driven into a house, park, or other place fortified. *Id.* 193. And no person ecclesiastical or temporal, above the age of 15 and under 70, is exempt, but must assist him. *Id.* 194.

And therefore the sheriff cannot return that the cattle are elloigned into a castle, &c. *Id.* & 8 *H.* 4. 19. *a.*

The sheriff must not use force before a demand of deliverance. 2 *Inst.* 193. Nor can he break into the house or close, if there is a door or gate open. 2 *Rel.* 552. *l.* 35. Otherwise, if the owner at the door, &c. by force hinders his entry. *Id.* 565. *l.* 37.

3. By *Custom*.

By custom in the county of *Northampton*, in the absence of the sheriff's bailiff, the *frank pledge* may make replevin. 2 *Inst.* 139.

By

By the custom of *London*, upon security for return of the goods, or the value, the sheriff sends an officer to appraise the goods, if he can, and to deliver them to the plaintiff. *Priv. Lond.* 170.

By custom a replevin may be granted by the hundred court, 5 *Com. Dig.* 290. *Cit. Dub. Sal.* 580.

But a custom, that goods taken in *London* shall not be replevied by the king's writ, but only in *London*, is not good. *Dy.* 246. b. And therefore a return of such a custom was disallowed. *Dy.* 246. a. *Vide ante* I.

4. By a Writ of Second Deliverance.

If the plaintiff is nonsuited in replevin, and his cattle, &c. are afterwards taken again for the same cause, he may have a writ of second deliverance for his cattle, &c. *F. N. B.* 72 *D.* whether the nonsuit is after or before avowry. *Id.* And this writ of second deliverance is a judicial, and not an original writ, which was granted by the *stat. W.* 2. 13. *Ed.* 1. c. 2. 2. *Inst.* 341. And this writ issues out of the record, upon which the nonsuit was. *Id.* And it must be conformable to the first record. *Id.*

And therefore, if after *withernam* was awarded upon an elloigment of the cattle after nonsuit, the *second deliverance* shall not be of the cattle taken by the *withernam*, but of the first cattle. *Id.*

It must be tested upon the same day, upon which the *retorn' habendo* was returnable upon the former writ. 2 *Rol.* 97.

If the plaintiff declares in *second deliverance*, the defendant avows or makes conuzance like as in replevin. *Co. Ent.* 585. And the *second deliverance* will be a *superfedeas* to the *retorn' habendo* upon the first writ, but not to the inquiry of damages; for these are given by the *stat.* 21. *H.* 8. c. 19. for costs on the first writ. *R.* 1 *Salk.* 95. 2 *Inst.* 341.

The writ of second deliverance is not taken away by 11 *Geo.* 2. c. 19. and it is not a *superfedeas* to a writ of inquiry of damages on the *stat.* 17. *Car.* 2. c. 7. but after writ of second deliverance, defendant cannot proceed upon *retorn' habendo*, *Barnes* 427.

5. Pledges when found.

By the *stat. Westm.* 2. 13. *Ed.* 1. c. 2. The sheriff, before deliverance made of the goods, ought to take pledges to prosecute

secute and for retorn' habend' (if return be awarded) otherwise he shall answer the price of the goods. *Co. Lit.* 145. *b.* And therefore if upon a writ of replevin, the sheriff does not take pledges, it will be error. *R. Cro. Car.* 594. and for his default an action upon the case lies against the sheriff. *Id.* 446. Or against the bailiff of the franchise. *2 Inst.* 340.

And by the *stat. Westm.* 2. 2. If the bailiff hath not, whereof he may answer, the superior shall answer. *Id.*

So in *homine replegiando* the plaintiff shall find pledges to prosecute with effect, and to deliver the person his goods. *5 H. 7.* 3. *a.* So, if the sheriff takes insufficient pledges, he shall answer, as well as if he takes none. *2 Inst.* 340.

And therefore if the plaintiff is nonsuited, &c. and upon the *retorno habendo* the sheriff returns *elongata*, the defendant shall have a writ for the cattle or goods of the pledges. *Id.* And if upon the writ against the pledges, the sheriff returns *nihil*, there shall be *scire facias* against the sheriff *quod reddat tot' averia vel catalla*, &c. *Id. Hut.* 77. *Off. Br.* 243.

Sed Q. if this is in any case but where the sheriff hath been guilty of wilful negligence, in taking insolvent persons as pledges?

Suppose them solvent when taken, and that they afterwards become insolvent, shall the sheriff, in such case, be answerable?

Money deposited in lieu of pledges is not sufficient. *R. Cro. Car.* 446. *Jon.* 378.

One pledge is good, if he is sufficient, for it is at the peril of the sheriff, that he takes one or more pledges. *Cro. Car.* 446.

If the writ is removed by *recordari*, when the sheriff hath not taken pledges, the court may take pledges, at any time before judgment, to avoid error. *R. Mar.* 46. *Noy* 156.

Upon a replevin by plaint, pledges are not necessary. *Cro. Car.* 594. For the omission is not error. *R. Jon.* 439. This at common law, but now by the *stat.* 11. *Geo.* 2. *c.* 19. §. 23. On a distress for rent, all sheriffs, &c. may and shall, in every replevin of a distress for rent, take in their own names from the plaintiff and two responsible persons as sureties, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect, and for return of the goods if return awarded, before deliverance of the distress.

This bond is assignable to the avowant, or person making conuſance, by indorsement. The assignment to be stamped before

before action brought. The avowant, &c. may then sue in his own name. The court may give relief by rule, which operates as a defeasance.

6. *Replevin, how removed.*

By pone.

If the replevin be in the county by writ, it may be removed by *pone*, into C. B. or B. R. F. N. B. 69. M. And may be removed by the plaintiff without cause. *Id.* And by the defendant with cause, but not without cause. F. N. B. 70. A.

But the replevin remains before the sheriff, 'till removed by *pone* or other writ; for the *replevin*, *alias*, and *pluries* are all *vicontiel*. 2 H. 7. 5. b. And therefore if the sheriff returns upon a *pluries*, that he has made deliverance, B. R. or C. B. cannot proceed upon it, for the parties have no day in court by the writ. *Id.*

If a plaint is removed by *pone* or *recordari* into B. R. or C. B. the plaintiff must declare there *de novo*, otherwise the defendant shall sue out a writ *de retorno habendo*, F. N. B. 71. A. And nothing shall be removed but the plaint, though issue is joined. *Id.* And the plaint may be removed, though the plaintiff has discontinued there. *Id.*

By Certiorari.

If the replevin is in a court of record, that may hold plea in replevin, it may be removed by *certiorari*. 3 Mod. 56. And it cannot be removed out of a court of record except by *certiorari*. 5 Com. Dig. 291. cit. per King C. J. Hil. 3 Geo. Though the plaint was begun in the county, hundred, &c. and afterwards removed into a court of record. Per King. *Ibid.*

After removal the plaintiff may declare *de novo* in B. R. or C. B. when the plaint removed is transmitted there by *mittimus*. Bra. R. 419.

By Recordari.

If the replevin be in the county by plaint, it may be removed into C. B. or B. R. by *recordari*. F. N. B. 70. B. And

And this by the plaintiff without cause in the writ, and by the defendant with cause. *Id.*

If the sheriff returns the *recordari, tarde*, the plaintiff shall have an *alias recordari*. *Id.* And though the *recordari* is tested before the plaint entred, yet it is good. *Id.* 71. d. *Bro. recordare* 9. 1 C. 3, 4.

If the *recordari* varies from the plaint in the names of the parties, in the things comprised, &c. the plaint shall not be removed. *Dalt.* 1, 33.

The *recordari* in replevin is filed by the filazer, in other actions by the prothonotary. *Barnes*, 222.

By Accedas ad Curiam.

If the plaint be in the court of another lord, it may be removed into *B. R.* or *C. B.* by *recordari* to the sheriff, commanding him *quod accedat ad curiam et in plena curia ill' recordari facias*, &c. *F. N. B.* 70. B. As if it be in the hundred-court, wapentake, tithing, &c. *Id.*

But it cannot be removed by an *accedas ad curiam*, which bears date before the plaint entred. *Id.* 71. d. Nor two plaints by one *recordari*. *Bro. recordare* 11. 3 H. 7. 14. a. Nor, if there is a material variance between the plaint and *recordari* in the name of the court, or of the parties. *Dalt.* 33.

Nor shall it be removed out of a court, which is not the king's court, without cause, neither by the plaintiff nor the defendant. *Reg.* 85. b. 2 *Inst.* 339.

7. Declaration in Replevin.

The declaration in replevin may be laid in the county where the cattle or goods were taken, or in the county into which they were driven after the taking. *F. N. B.* 69. I.

Two persons who have not a joint interest, cannot join in replevin. *Co. Lit.* 145. b. 3 H. 4. 16. a.

The declaration in replevin ought to mention the place in which the taking was. 1 *Sid.* 9. And, if it is omitted, the defendant may demur to the declaration. So, if there is a blank for the place. 5 *Com. Dig.* 292.

So, if it mentions several cattle taken in *A.* and *B.* for all the cattle cannot be taken in both places; but the declaration must say how many were in one, and how many in the other place. *R. Lit.* 37.

If it mentions a place in *A.* and by replication avers, that the same place was in *B.* it will be a departure. *R. 1 Sid. 10.*

If the defendant avows in another place, he must traverse the place in the declaration. *R. upon a general demurrer. Lut. 1150. 9. H. 6. 39. b.*

But the omission of the place or *vill*, will be aided, if the defendant does not demur for that. *R. 1. Sid. 9, 20.*

It must be conformable to the original; and therefore, if the original is for *beasts*, and the declaration for *an horse*, it is error. *R. Cro. El. 330.*

Or, if the original is in the *detinet*, and the declaration in the *detinuit*. *Lut. 1150. Vide ante, No. 1.*

It must mention the cattle, or goods, demanded, with such certainty, that the sheriff may make deliverance of them.

And therefore if it is for 100 sheep, ewes, and wethers, without saying how many of each sort, it is bad. *R. Al. 33. Carth. 218.* It must mention the species of cattle; as, sheep, ewes, &c. *Carth. 218.* And the value. *Per Ellis. Id.*

If the cattle, taken, are returned, the declaration shall say, *wherefore he took, &c. and unjustly detained them against gages and pledges, until, &c.* *1 Saund. 347.*

If they are not returned, it shall be, *wherefore he took, &c. and still detains against gages and pledges, omitting until, &c.* *Raft. Ent. 560. Co. 610. b.*

So, if only part are returned, it shall say as to that *detained until, &c.* and for the residue, *and still detains.* *Co. Ent. 611. b. 613. a.*

If the declaration is in the *detinet*, the plaintiff shall recover the value of the cattle, damages for the taking, and costs. *F. N. B. 69. L.*

But he cannot recover the cattle in *specie*, but only the value. *Dalt. 84.*

If the defendant appears upon the *withernam*, the plaintiff shall count upon the writ of *withernam*. *Dy. 189. a. Co. Ent. 611. b. 613. a.* And thereon pledges may be found for delivery of the cattle taken upon the *withernam*, and also for the cattle esloined. *Co. Ent. 611. b. 613. a.*

And the delivery shall be pledged before avowry. *Per Dy. Dalt. 65.*

If the declaration is only for part of the cattle, the defendant may avow for them and the others, and pray a writ to the sheriff immediately for the others, if replevin was made of them.

Fourteen skimmers and ladles, and three pots and covers, is sufficient certainty. *Stra.* 1015. *B. R. H.* 119.

Though husband and wife jointly cannot maintain replevin for taking the goods of husband and wife; yet if defendant avows, it shall be intended that the taking was before the coverture, and that they had then a joint property. *Ibid.*

And in that case the taking must be laid to their damage. *Ibid.*

The taking need not be laid in the place where the taking originally was, any other place where the cattle were in the defendant's custody, is good. 2 *Wils.* 354. *Vide post.* No. 9.

8. Pleas in Replevin.

In Abatement.

To replevin the defendant may plead in abatement, or in bar. In abatement, *that he took in another county.* *Tb. Br.* 65. *That he took in another place*, with a traverse of the place in which, &c. *Asb. Ent.* 474. *Mod. Ra.* 102. *Vide ante* No. 7. To which the plaintiff may join in issue upon the traverse. *Asb.* 475. or reply that the place is known as well by one name as the other, but *vide infra* No. 9.

That the place in which, &c. is in another vill. *R.* 2 *H.* 6. 14. *a.* So in abatement the defendant may plead property in him and not in the plaintiff. *Co. Ent.* 314. *b.* So, if there are several cattle, the defendant may plead that the property of part is in him.

So the defendant may say that the property is in a stranger, and not in the plaintiff. Or in the plaintiff and a stranger.

If the defendant claims property before the sheriff, he may return it upon the *alias* replevin, and thereupon a writ *de proprietate probanda* issues; for the property cannot be tried but by writ. 5 *Com. Dig.* 293.

This writ issues out of *chancery* or out of *B. R.* or *C. B.* *Dy.* 173. *a.* When it issues out of *chancery*, it is an original, and goes upon the sheriff's return to the *alias* replevin. *Id.*

When it issues out of *B. R.* or *C. B.* it is judicial, and granted to the party upon the sheriff's return. *Id.* And is only an inquest of office, upon which, if it is found for the plaintiff, the sheriff must make deliverance to him. *Co. Lit.* 145. *b.* 7 *H.* 4, 45. *b.*

If it be found for the defendant, the sheriff does not proceed. *Co. Lit.* 145. *b.* *Dy.* 173. *a.* Yet the plaintiff may as-

terwards proceed in *C. B.* upon the writ of replevin, and the property shall be tried there. *Co. Lit.* 145. *b.* Though the sheriff returns upon the writ the claim of property. *Id.* & 7 *H.* 4. 46. *a.*

If a man claims property *in curia com'*, it must be in person and not by bailiff, or servant. *Co. Lit.* 145. *b.* But in *C. B.* he may claim by bailiff. 1 *Leo.* 90.

In abatement, the defendant may plead bailment to him by the plaintiff, for which detinue lies, and not replevin. 5 *Com. Dig.* 294.

9. *In Bar.*

In bar, the defendant may plead the general issue, *non cepit.* 1 *Bro. Ent.* 312.

So, if the taking was in another place, he may plead *non cepit*, though he shall not have any return. *Per North.* 2 *Mod.* 199. And if there are many defendants, one may plead *non cepit.* *Lut.* 1131. Or *non cepit* to part.

If the defendant appears after *withernam* awarded, he may plead *non cepit*; for he is not concluded by the sheriff's return of *elongavit.* *R.* 4. *Mod.* 183. *Salk.* 581.

But he cannot plead *non cepit infra sex annos*, for this does not answer to the detainer. 1 *Sid.* 81, 2.

The defendant may plead *property* in bar, as well as in abatement. 5 *Com. Dig.* 294.

And though he pleads property to all the cattle in the count, yet upon evidence he may prove a less number. 1 *Leo.* 43. So he may claim property, though the sheriff returns *elongata.* *Salk.* 581.

So the defendant may make confuance, for that the property is in another. *R.* 1 *Lev.* 90. So he may plead *property in a stranger* in bar. *R.* 1 *Salk.* 5.

If he pleads *property*, and traverses the property of the plaintiff, issue ought to be joined thereon, for a traverse of property in the defendant is not material. *R.* *Skin.* 65. *Dub.* but held will after verdict for the plaintiff. *Winch.* 26.

The defendant may plead a release from the plaintiff. A release, after the last continuance. *Lut.* 1142.

The plaintiff in bar of the avowry may plead a release from the defendants, or one of them. *Lut.* 1143.

Or a release from him, in whose right the defendant avows, or makes confuance. *Ibid.*

The defendant may plead a plea in justification, without making avowry or confuance. *R.* 3. *Lev.* 205. *Lev. Ent.*

152. But then he cannot have a return of the thing taken. 3 Lev. 205. 1 Rol. 319. l. 20. And, if by matter *ex post facto* he cannot have the thing taken, he must justify. 1 Rol. 314. l. 35. Or, if he had no interest at the time of the distress. 1 Rol. 318. l. 45. 320. l. 5. 2 Cro. 436.

Cepit in alio loco is a plea in bar, not in abatement; no affidavit is necessary, nor need it be pleaded in four days after declaration delivered. Barnes 353.

10. Avowry.

If the defendant had lawful cause for the taking, the most proper and usual course is to make avowry or conuance, which is in the nature of a bar. Mod. Ca. 102.

An avowry imports a justification of the taking in his own right. Or in right of his wife. 2 Saund. 195. And in all cases, where the defendant expects a return of the cattle or goods taken, he must make an avowry or conuance *pro retorno habendo*. Mod. Ca. 103.

And therefore, if the defendant pleads a taking in another place, he must make an avowry, *pro ret' habend'*; for the plaintiff, having alledged the property of the cattle in himself, shall not lose them without cause. 39 H. 6. 35. 1 Salk. 93, 4. So, if he demurs for want of a place alledged. R. 35 H. 6, 40. So in all cases where he pleads in abatement, matter collateral to the action. 1 Salk. 94.

The title of the avowry or conuance to have a return cannot be traversed. 1 Salk. 93, 4.

But, if the defendant pleads property in himself as he thereby directly falsifies the supposed property in the plaintiff, he may have return without avowry. So, if he pleads property in a stranger in bar. So, if the plaintiff is nonsuited before declaration, whereby avowry is prevented, the defendant shall make a suggestion what cattle, &c. were taken, and have a writ *pro retorno*, if the sheriff *constare poterit allegationem fore veram*. 5 Com. Dig. 295.*

So, if the plaintiff declares for a less number of cattle or goods, he shall make such suggestion for the cattle, &c. omitted. Ray. 34.

* Here it may not be improper to observe that by 11 Geo. 2. c. 19. the sheriff on distress for rent, is to take a replevin bond with sureties, which by § 23. is to be assigned to the avowant or person making conuance, if he has judgment. But if plaintiff is nonsuited, before avowry or conuance, the bond is not assignable, but must be sued in the name of the sheriff.

So,

So, if the plaint is removed by *recordari*, into *C. B.* and the plaintiff does not declare there. *Id.*

If a man, who takes a distress, has no interest, he cannot avow in his own name: As, if the supervisor of a common, distrains according to custom upon a surcharge of the common, he cannot avow in his own name, *1 Rol. 318. l. 45.*

But a man may avow, though his interest is determined after the distress, before the replevin. *Id. 319. l. 20.*

When defendant avows at a different place to have a return, he must traverse the place in the count; but when he does not insist on a return, he may plead *non cepit*, and prove the taking at another place. *Stra. 507.*

If the plaintiff dies after declaration, and before avowry, there cannot be a writ *de ret' habend'*, but defendant may distrain again. *2 Wilf. 83.*

The defendant may have leave to withdraw his avowry, and plead property in a stranger. *Barnes 348.*

11. *Conusance.*

Conusance imports the justification of the taking in another right.

And therefore one defendant may avow, and the other make conusance in his right. And if one avows and the other makes conusance, without saying as bailiff of the former, and entire damages are given, it will be error. *R. Yelv. 108.*

If the defendant makes conusance as bailiff or servant, he needs not shew his authority. *4 Mod. 378.* If he makes it as bailiff to the king, a patent need not be alledged. *Bro. Bailiff. 1.* Or, as bailiff to a corporation, he need not alledge a deed. *R. 3 Lev. 107.* Nor say *per eorum preceptum.* *Id.* Or shew how incorporated. *Id.*

And it is not traversable, generally, whether he was bailiff, or not. *R. Cro. El. 14.* It is not traversable, where he justifies in trespass or replevin, as bailiff, in a close which is the freehold of a stranger. *1 Salk. 107.*

But where he took contrary to the will of his master, upon such inducement it may be traversed. *R. 3. Lev. 20.* So, it may be traversed, that he took as bailiff to another, and not to *A. R. 1 Leo. 50. R. 2 Leo. 196, 216.*

That he took of his own wrong, *absque hoc*, that he took as bailiff, for this is material, where the taking is of cattle. *R. 1 Salk. 107.*

If

If one defendant pleads *non cepit*, the other may make conufance in his right, for he fhall not lofe his advantage by the other's plea. 1 *Rol.* 320. l. 25.

If the defendant fays *bene advocat*, &c. for *bene cognovit*, it is form only. 2 *Cro.* 372.

If he fays *bene cognovit captionem in prædicto loco*, without faying *tempore quo*, &c. it will be well. *R.* 2 *Mod.* 4.

If he does not describe how many acres the *locus in quo* contains, in his avowry, it will be well. *R.* *Lut.* 1232.

Avowry or conufance ought to make a good title in *omnibus*, for it is founded upon the right. *Carth.* 74. For it is in the nature of a count and muft contain fufficient matter to have a return. 7 *Co.* 25. a. And therefore if he avows for homage, he muft make a title to homage. 5 *Com. Dig.* 296.

If the replevin is, *that he took the cattle and goods*, and the defendant avows or makes conufance of *the taking of the cattle and goods*, but his juftification goes only to the cattle, without fpeaking of the goods, it will be bad. *R.* 5 *Mod.* 77. So, if the replevin be *that he took the beafts, cattle, and goods*, and he makes avowry or conufance of the cattle only it will be bad. *R.* 4 *Mod.* 402.

If the avowry or conufance is bad, the defendant fhall have no return, though the replevin is alfo bad, and the declaration therein qualified for defect. *R.* *Show.* 99.

Two defendants cannot make feveral avowries for the fame thing, each in his own right, for each cannot have judgment, feverally, for the fame thing. 5 *Co.* 19. a. *See qu?*

The avowry need not be for the fame caufe, for which the taking was; for if a man diftrains for one caufe, he may afterwards avow for any other caufe, for which the taking was juftifiable. 3 *Co.* 26. a. 2 *Leo.* 196.

So, an avowry for rent, if it appears that part is not in arrears, will be good for fo much as is due, upon demurrer. 1 *Sand.* 287. Otherwise, if he avows for an intire rent, and it appears that he has title only to two parts. 1 *Sand.* 286. *R.* *Mo.* 281. Or, if he avows for 30l. part of the rent for half a year, without fhewing that the refidue was fatisfied. *R.* 4 *Mod.* 402.

If a diftreff is made for a year's rent, the landlord may avow for three quarters, only, or any leffer part. But if it is doubtful how much is due, as under the *ftat.* 4 *Ann.* c. 16. he may by leave of the court, make feveral avowries, he
had

had better so do, avowing for a year, three quarters, half a year, &c.

By the 11 Geo. 2. c. 19. § 22. Such avowry, (as well as for services) may be general, *i. e.* without stating a title, only an *holding*, &c. as tenant.

If a man avows *pro cert' lettee*, and for a fine for not presenting, where it appears that the fine was excessive, he shall not have a return. 11 Fo. 45.

An avowry for rent in arrear *at the time of the taking* is sufficient, without saying, *and still being in arrear*. R. Dalt, 72.

If the avowry is for rent due at *Michaelmas*, and the distress is alledged before *Michaelmas*, and judgment for the avowant, it may be amended after error brought for it. R. Salk. 580. But, if it is not amended, it will be error, where he takes judgment for the whole rent till *Michaelmas*. R. *Id.*

If the avowry or conuſance is by attorney, when the defendant was an infant, the plaintiff may plead it in abatement. R. 1 Salk. 93.

12. Avowry.

For Rent and Services.

The most useful avowry is upon distress made for rent, or services.

At common law the defendant, in such avowry must have alledged in certain, what lands were held of him, or of his lord, and by what tenure, and many niceties in various cases, attended such avowries. As two statutes have in a great measure rendered the learning on this head almost useless, I shall only give abstracts of those statutes, and refer the curious reader to 5 Com. Dig. 296, 7, 8.

By the stat. 21 H. 8. c. 19. It is enacted, That where any lands, tenements, and other hereditaments, are holden by any person, or persons, by *rents*, *customs*, or *services*, if the lord of whom they are holden, distrain for any such rents, customs, or services, and *replevin* thereof be sued, he may avow, or his bailiff, or servant, may make conuſance or justify for taking of the distress, upon the same lands, &c. so holden, as in lands or tenements within his fee or feignory, alledging in the said avowry, conuſance, and justification, the same manors, lands, and tenements to be

be holden of him, without naming of any person certain to be tenant of the same, and without making any avowry, justification, or conuſance upon any person certain. So upon every writ sued of ſecond deliverance. *Vide* 9 Co. 33. a. 6 Co. 59. b. *Co. Lit.* 268. b. 9 Co. 22. a. 36. a. 65. a.

By the *ſtat.* 11 *Geo.* 2. c. 19. § 22. It is enacted, 'That it ſhall be lawful for all defendants in replevin (in caſes of diſtreſſes for *rent, quit-rents, reliefs, heriots, and other ſervices*) to avow or make conuſance generally, that the plaintiff in replevin, or other tenant of the lands and tenements, whereon diſtreſs is made, enjoyed the ſame under a grant or demiſe, at ſuch a certain rent, during the time wherein the rent diſtrained for incurred, which rent was then, and ſtill remains due; or that the place where the diſtreſs was taken was parcel of ſuch certain tenements, held of ſuch honor, lordſhip, or manor, for which tenements, the rent, relief, heriot, or other ſervice diſtrained for, was at the time of ſuch diſtreſs and ſtill remains due, without further ſetting forth the grant, tenure, demiſe, or title of ſuch landlord or landlords, leſſor or leſſors, owner or owners of ſuch manor. On plaintiff being nonſuited, diſcontinuing, or having judgment againſt him, defendant to recover double coſts.

13. *Bar to Avowry for Rent and Services.*

To avowry for rent and ſervices, the plaintiff in bar may diſclaim. 9 Co. 34. b. So he may diſclaim, generally, and thereupon ſhall have judgment; but the lord may have a writ of right upon the diſclaimer. *Mod. Int.* 306. Or confeſs the avowry. *Id.* 319. Or plead, *out of his fee*, generally. *R.* 28 *Hen.* 6. 10. So he may plead, *out of his fee*, without diſclaiming, which will be perilous. Or he may confeſs the tenure in part, and traverse the tenure *modo et forma*. And, if it is found for the plaintiff, he ſhall have judgment, though the avowry was for rent, the tenure by which was confeſſed. 5. *Com. Dig.* 298.

If he alledges tenure for part of the land, he may alledge that this and other land is held by ſuch ſervices, and traverse that only part is ſo held. 9 Co. 35. b. So he may confeſs the tenure and traverse the ſeiſin. 9 Co. 33. a.

But the plaintiff cannot traverse the ſeiſin of ſervices generally. 9 Co. 34. b. 22 *H.* 6. 3. *Fitzh. avowry.* 15. For, if the lord had not ſeiſin of the ſervices, the plaintiff ought to confeſs the ſeiſin and traverse the ſeiſin. 9 Co. 33. b.

So

So since the *stat.* 32 H. 8. c. 2. he may plead, *never seised within 50 years.* 8 Co. 64. b. *Mod. Int.* 322. 3, 4, & 5 *Ann. c.* 16. § 16.

If he was seised only for part of the services, he may plead that the tenure was by part, but never seised for the residue within 50 years. 9 Co. 34, 5.

He cannot plead tenure of a stranger, and traverse the tenure. 9 Co. 35. a. R. 10 H. 6. 6. b. for he must disclaim, or plead, *out of his fee.* 10 H. 6. 6, 7.

But this plea is not good, if the avowry is for casual service, as fealty, &c. R. 3. *Lev.* 21. So, if the tenancy is granted by fine, &c. to the king, the lord cannot avow generally for rent-service. R. 1. *And.* 160.

So now since the *stat.* 21 H. 8 c. 19. The plaintiff in replevin in bar to avowry for rent, may plead *nothing in arrear.* R. Ray. 254, &c. Though he does not make any title to the land, *Id.* 258. Though he is only lessee for years, or a stranger. R. 254.

So he may plead all pleas, which he had by the common law, except disclaimer. 2 Cro. 127. Co. Lit. 268. b. As, he may plead, *out of his fee,* 2 Cro. 127. *Mod. Int.* 303. Or traverse the tenure. 2 Cro. 127. D. that he shall plead no plea, but a disclaimer, or *out of his fee.* Mo. 870.

Qu. If the plea of disclaimer is not taken away by the *stat.* 21 H. 8. c. 19?

The plaintiff may plead in bar to an avowry, *de son tort,* with a traverse that the *locus in quo,* &c. is parcel of the tenements alledged to be held. *Raft. Ent.* 556. b.

But by the common law before the 21 H. 8, c. 19. a stranger to the avowry, viz. he, upon whom the avowry was not made, could not disclaim. Nor could plead, *out of his fee* or any thing *tantamount.* 22 H. 6. 2. b. Nor *nothing in arrear.* *Id.* Nor *levy by distress,* and so *nothing in arrear.* 22 H. 6. 3. a.

But in these cases he ought to pray in aid of the very tenant, and then disclaim or plead these pleas. 22 H. 6. 22. b.

So plaintiff to an avowry for rent upon him as very tenant, cannot say *nient seise,* for this amounts to a disclaimer, and therefore he must disclaim. 21 H. 7. 20. a.

If on avowry for non-payment of rent, a plea in bar is *de injuria sua propria, absque hoc;* that the *aforesaid R. took,* &c. that he did not take, is no good traverse: he should pursue his title, and *de injuria sua propria* is enough. *Fort.* 362.

On avowry for rent, and issue thereon, plaintiff cannot give evidence to set off a mutual debt; but by way of *specia*

cial plea to avowry, he may plead mutual debt of more than the rent. *Barnes* 450.

14 For Relief, &c.

The defendant avows for relief like as for other services. *Vide ante*, No. 11.

He need not make mention of the relief in his avowry, but of the tenure only; for the relief is incident to it. *R. 3 Lev.* 145. And if it be severed by release, &c. it must be shewn on the other side, *Id.*

I need not state the common law on this subject.—No man will be unwise enough to avow as at common law, when he may avow under the *stat.* 11 *Geo.* 2. c. 19. § 22. *Vide ante*, No. 11.

15. For a Rent Charge.

A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it. *Co. Lit.* 142.

I think this does not come within the meaning of the 11 *Geo.* 2. c. 19. for a general avowry, because here is not any *tenancy*. I ought therefore to state the manner of avowing.

If the avowry be for a rent-charge, the avowant must shew his title to the rent: As, by a grant to him in fee, or in tail, or for life. *Co. Ent.* 590. By devise to him, or his wife. 2 *Saund.* 195.

By grant or devise to such an one, under whom the defendant derives his title. By grant or devise to such an one, to whom the defendant is executor or administrator, and avow for arrears in his life-time. *Win. Ent.* 1015.

So, he ought to show that the *locus in quo*, &c. is parcel of the land charged; for to say *quod est et tempore quo*, &c. *fuit*, is not sufficient; for this imports no more than that it was so at the time of the distress. *R. 2 Vent.* 150 4 *Mod.* 150. But the avowant need not alledge seisin of the rent, where the commencement appears by deed. 8 *Co.* 65. a.

As,

As, if he avows for a rent-charge. *Id.* Or for rent reserved upon a gift in tail. 1 *Rol.* 314. l. 10. Or upon a demise for life or years. 5 *Com. Dig.* 299.

Or for a rent in fee, reserved by deed, upon a conveyance in fee. *R.* 8. Co. 65.

So, if the rent is reserved by act of parliament. *Cro. Car.* 81.

In bar to an avowry for a rent-charge, the plaintiff may say, *Quod non concessit.*

He may demand oyer of the grant and demur.

He may say that the grantor was seised in tail, &c. and traverse the seisin in fee.

That the rent was extinguished by a fine.

That he made a legal tender. 5 *Fom. Dig.* 300.

16. For Rent upon a Reservation.

As the party may avow under the *stat.* 11 *Geo.* 2. c. 19. (*Vide ante*, No. 12.) I shall not state the ancient law, but only refer the curious to 5 *Com. Dig.* 300.

17. Bar to an Avowry for Rent upon a Reservation.

In bar to an avowry for rent reserved, the plaintiff may plead as in bar to debt for rent: As, *non demisit.* *Clift.* 641. 2 *Saund.* 312.

Nothing in Arrear.

Nothing in arrear for part of the rent, and tender of the residue. *Clift.* 646. *That the avowant afterwards used or sold the cattle or goods distrained.* *Lut.* 1423.

After issue joined upon a plea in bar to the avowry, the court will not suffer the plea to be withdrawn, and the avowry confessed, without consent, for the avowant will lose his costs. *Skin.* 594.

Nil habuit in tenementis is no plea (even for a stranger) since the 11 *Geo.* 2. c. 19. The statute has taken away the tenant's right to controvert the defendant's title in replevin, *Vide* the case of *Sullivan v. Stradling.* 2 *Wils.* 208, &c.

18. For Damage Feasant.

If the defendant avows or makes conusance for *damage feasant*, he must shew that the place where, &c. is his freehold,

hold, or the freehold of *B.* underwhom he makes conuſance.
Vide Lut. 1140.

And if he ſays that he himſelf or *B.* was ſeiſed, he muſt ſay of what eſtate, in fee, tail, or for life. *R. Lut. 1243.*

19. *Bar.*

His Freehold.

To this avowry the plaintiff may ſay in bar, that it is his freehold. *5 Com. Dig. 300.*

Or the freehold of A. and by his licence he put his cattle there. 1 Co. 64. a.

Or a ſpecial title by deviſe, fine, demiſe, &c. *5 Com. Dig. 300.*

20. *Tender of Amends.*

So the plaintiff may plead in bar, *tender of amends.*

If the defendant pleads that he was ſeiſed of three acres *in loco in quo*, &c. it is ſufficient, without ſaying how many acres the *locus in quo* had. *R. upon ſpecial demurrer. Lut. 1232.*

21. *Bar by Common.*

In bar to an avowry for *damage feaſant*, the plaintiff may ſay that he is intituled to common in the place where, &c. and this common appendant or appurtenant. Common by reaſon of *vicinage*. *5 Com. Dig. 301.* And he muſt ſhew in what *vill* the land lies, to which he claims common. *R. 2. Cro. 238.*

The plaintiff may plead that his leſſor is intituled to common for him and his tenants. *Co. Ent. 573. b.*

But he muſt ſhew how, and the nature of the common.

If the plaintiff preſcribes for common, he muſt make a good title to the common. And for common appendant or appurtenant, he muſt ſhew a ſeiſin in fee of the land to which he claims common, and then alledge that he *and all whoſe eſtate he hath*, &c. time whereof, &c. have had common in ſuch place, &c. *1 Saund. 346. Col. Lit. 113. b.*

If he claims common in *groſſs*, he need not alledge ſeiſin of the land, but only that he and all his anceſtors have had,
time

time whereof, &c. common in such place, &c. 1 Saund. 346.

If a copyholder claims a common in another manor, he must alledge feisin in his lord, and that he for himself, and his customary tenants has common in such place, &c. Vide 2 Saund. 326. If he claims common in a waste of the same manor, he must alledge it by way of custom. Co. Lit. 113. b. And he need not shew what estate the copyholders have in their customary tenements. R. 2. Saund. 326.

If the plaintiff is a lessee for years, he must alledge a feisin in his lessor, who has the fee, and prescribe in him and all those whose estate, &c. and then derive the term to himself, &c. for, if he alledges a prescription in himself it is bad. R. Cro. Car. 599. So he must alledge a prescription for common, time whereof, &c. where it is contrary to common right. As for common appurtenant, or by reason of vicinage; and it is not sufficient to say, all have had and been accustomed to have, without more. R. Lut. 161.

If he prescribes for common appendant, he ought to claim it only for cattle *levant and couchant*. R. Lut. 1359. R. 1. Sid. 313. But, if he prescribes for common appendant to an house or cottage, it will be well, for this comprises any land. R. 1. Salk. 169. Semb. 1. Brownl. 198. And for cattle, *levant and couchant* is sufficient, without other certainty. R. 1. Brownl. 198.

So he must alledge *user* of his common according to his prescription: As if he claims common for cattle *levant and couchant*, he must shew that the cattle put there were *levant and couchant*. 1 Saund. 28. R. H. 10 Ann. in C. B. 5 Com. Dig. 301.

But the omission shall be aided after verdict. 1 Lev. 196. R. 1. Saund. 227. R. 2. Cro. 44.

If he claims common appurtenant for a certain number of cattle, without saying *levant and couchant*, he need not shew that they were so. R. 2 Cro. 27.

If the plaintiff claims common for all *commonable* cattle, he must shew that the cattle put there were so. Semb. Lut. 1470.

If he claims common, from the time of cutting and carrying away the corn, till the land is sown again, he must shew that the cattle were put there within that time. R. 2 Cro. 637. Vide Pl. Com. 33. b. And he must say that no part of the land was sown again. 2 Cro. 637.

Repli-

Replication.

To a prescription for common the defendant may reply *de son tort*, with a traverse of the prescription.

Or with a traverse of the *levancy and couchancy*; for this goes to the gift of the justification. 5 *Com. Dig.* 302.

The foddering of the cattle in his yard is evidence of their being *levant and couchant*. 1 *Salk.* 169.

22. *Bar by Way.*

In bar of an avowry for *damage feasant*, the plaintiff may prescribe for a way. And he must shew what way he claims in certain: As whether it be for horses, carriages, &c. And the *terminus a quo*, and *ad quem*, &c.

Replication.

To this bar the defendant may reply *de son tort*, and traverse the prescription.

Or acknowledge the way, and say that the trespass was *extra viam*. *Bro. Ent.* 297.

If the defendant traverses the prescription, the plaintiff shall join issue upon the traverse.

If he pleads *extra viam*, the plaintiff may rejoin to it *not guilty*. *Bro. Ent.* 297.

23. *By force of a Warrant or Commission.*

The defendant may make avowry by authority of the commissioners of sewers. 5 *Com. Dig.* 302.

By the *stat.* 23 *H. 8. c. 5*. The defendant may avow generally, that he took by authority of commissioners of sewers, for an assessment by such commissioners. *Co. Lit.* 283. *a.*

But, if the defendant waives the short pleading allowed by the statute, and shews the special matter, he must plead all things sufficiently, otherwise it will be bad. *Sti.* 12. *Lut.* 1180.

The defendant may avow by virtue of a warrant to distrain for the poor's rate, pursuant to the *stat.* 43 *El. c. 2*.

So by force of a warrant upon a conviction for fraud in the excise. *Lev. Ent.* 152.

So

So by authority of any statute giving a distress, of which there are, *now*, a great many, but which it's unnecessary to enumerate.

24. *For an Amerciament.*

The defendant may make avowry for an amerciament: As, for not appearing at a leet. 5 *Com. Dig.* 302.

For departing, when sworn upon the homage, before verdict given. *Co. Ent.* 570. *b.* For refusing to be constable. *Co. Ent.* 572. *a.* 5 *Mod.* 124.

So for an amerciament for stopping a way, or other offence presented. *Co. Ent.* 573. *a.* Or for taking inmates.

In an avowry for an amerciament, the defendant must shew the court leet, where imposed, to be duly held. *R. Cro. El.* 245. and before whom. *R. 1 Brownl.* 198. *Semb.* 5 *Mod.* 96. And over whom it has jurisdiction. *R. Skin.* 393.

If it is imposed for a refusal of an office, it must be shewn that he had special notice of his election thereto. *R. 5 Mod.* 130.

It must be shewn that there was good cause for the amerciament: As, that it was for an offence within the leet. *R. Hob.* 129.

In replevin it is not sufficient to say, that he was presented for such an offence, but it must be directly averred that such an offence was committed. Otherwise, in trespass. 5 *Com. Dig.* 303.

And *although he was guilty*, is not a sufficient averment. *Fig.* 109.

If the amerciament is general, *ideo in misericordia*, and afterwards assessed, it is sufficient. *R. 1. Salk.* 56. Or, if it is assessed at a sum certain. *Per Hole. Sho.* 62. *Vide infra.*

Qu. If the amerciament should not be at a certain sum, which the assessor may afterwards reduce? *Vide Hob.* 129.

He must shew that the amerciament was assessed by assessors. *R. 3. Lev.* 19. *Adm. Mod.* 89. And he must shew the names of the assessors. *R. Kel.* 66. *a.* So, the names of the suitors before whom presented. *R. 3 Leo.* 8. So he must shew the precept. And where made. 5 *Com. Dig.* 303.

If the defendant avows in replevin, as bailiff for an amerciament, he must aver that the defendant was guilty, for here he is an actor; though in trespass it is not necessary, for there the conviction justifies the officer. *Stra.* 847.

The

The amendment must be by the court, not by the jury, and there must be an assentment. *Id.*

25. *For Customs.*

The defendant may make avowry for a customary demand: As, for a fine due by custom upon alienation. 2 *Vent.* 132.

So, for a fine imposed by the leet, &c. for a contempt. So for a toll due by custom. So for an heriot due by custom. Or for heriot-service. So for breach of a bye-law. 5 *Com. Dig.* 303.

But, if the avowry is for a thing done against common right, a custom must be alledged to distrain for it. *R.* 1. *Salk.* 175.

Yet, where the avowry shews that the duty is due, it is sufficient without alledging performance of that, which was the consideration for the duty: As, if it says that a borough in consideration of maintaining the port shall have toll, &c. it need not alledge that the port was in repair, for it is sufficient that they are bound to repair it. *R.* 1 *Salk.* 249.

26. *Judgment in Replevin.*

For the Plaintiff.

If there be judgment for plaintiff for want of a replication to the bar to the avowry, or upon a demurrer, a writ of inquiry of damages shall be awarded.

So, if the defendant, *relicta verificatione, cognovit actionem*, or there is judgment against him by *nihil dicit*, &c.

Or at the request of the plaintiff, by the assent of the defendant, the justices may assess the damages without a writ of inquiry. 5 *Com. Dig.* 303.

If the judgment is upon a verdict, the jury usually assess the damages. 2 *Saund.* 315, or the jury after verdict may be dismissed, and damages assessed by the justices, with the defendant's consent. 5 *Com. Dig.* 303. In fact, this supposed assessment by the court, is a confession of the defendants.

If the jury do not assess damages, the plaintiff may make a suggestion upon the roll that the cattle are still detained, whereupon a writ shall go to inquire of the value of the cattle and the damages, upon which the plaintiff shall have judgment for both. 5 *Com. Dig.* 303.

If there is judgment for the plaintiff in replevin, *quod ad-buc detinet*, by default after appearance, there shall be a special writ of inquiry for the value of the cattle, or goods, and damages. *F. N. B. 69. L. Co. Ent. 611. a.*

But where the taking was lawful, the damages shall be only for the detainer: As, in replevin for goods taken *damage feasant*, and detained after amends tendered. *F. N. B. 69. F. G.*

27. For the Defendant.

If there is judgment for the defendant upon a demurrer or verdict, or the plaintiff is nonsuited, the defendant shall have *return irreplevisable*. *5 Com. Dig. 304. Vide post. 29.* As to writ of *second deliverance*, *Vide ante*, No. 4.

The defendant shall have return, though he pleads *non cepit* after a *withernam* awarded. *Salk. 581.* Or claims property. *Id.*

If the plaintiff is nonsuited, when the defendant avows for rent, the court may assess damages, without a writ of inquiry. *3 Leo. 213. Sed qu. de hoc.*

By the *stat. 17 Car. 2. c. 7.* Upon distress for rent upon the lands chargeable, if the plaintiff in replevin, by plaint or writ depending in any court at *Westminster*, be nonsuited before issue, the defendant may make suggestion in nature of an avowry, or conusance to shew cause of distress; and the court shall award a writ to inquire, &c. What arrear, and the value of the distress, of the execution of which, 15 days notice shall be given to the plaintiff or his attorney.

By the same statute, on the return of the inquisition the defendant shall have judgment to recover the rent in arrear, if the goods distrained amount to it, otherwise to the value of the distress with full costs, for which he may have execution by *feri facias, elegit, &c.* *1 Saund. 195.*

By the same statute, if the plaintiff be nonsuited after avowry, or conusance, and issue joined, or a verdict be for the defendant, the jury who were to try the issue shall inquire what arrear, and the value of the distress, and on return the defendant shall have judgment for the arrears mentioned in the avowry or conusance, if the distress amount to that value, otherwise to the value of the distress, and his full costs, and execution *ut supra*.

If the avowry is for rent-charge, as well as for rent service, the jury shall inquire what rent was in arrear, and the value of the cattle distrained. *Adm. 1. Lev. 255.*

If

If the avowry is for the poor's rate, or other duty, the jury shall inquire how much is due. *Semb. 5 Mod. 76.*

But if the jury (where the cause is tried), omit inquiring what is rent in arrear, it cannot be supplied by a writ of inquiry; for it must be by the same jury who try the issue. *R. 1 Lev. 255. 1 Salk. 205.*

It may be supplied by a writ of inquiry, where the avowry was for the poor's rate, and the plaintiff nonsuited. *Salk. 205. and Vide 5 Mod. 76, 77.*

If the jury (in case of rent,) find the value of the distress, and not what rent is in arrear, by which he cannot have judgment upon the verdict, yet if he thinks fit he shall have judgment at common law. *R. Ray. 170. 1 Sid. 380.*

If the plaintiff is nonsuited for want of a plea in bar, the avowant may sue the sureties on the bond, and need not execute a writ of inquiry for the damages. *2 Wils. 41.*

If the plaintiff is nonsuited for want of a declaration, and *return. habend.* is awarded, and then the plaintiff sues out a writ of *second deliverance*, yet the defendant may afterwards execute a writ of inquiry of damages; for though the writ of *second deliverance* is a *superfedeas* to the *return. habend.* yet it is not to a writ of inquiry. *2 Wils. 116.*

If goods distrained are not replevied, but by consent of the attornies, remain in the distrainer's hands, without writ of *re. fa. lo.* or appearance; after verdict for plaintiff, the court will set aside all the proceedings. *Barnes 451.*

28. Execution.

After judgment for the defendant by the common law, a writ *de retorto habendo* was awarded, which was *irreplevisable*, where the judgment was upon a demurrer, or after a verdict. *14. H. 7. 6. b.*

But if the judgment was upon a nonsuit before verdict, he should have *return*, but not *irreplevisable*. *Id. 34 H. 6. 5. a.*

If upon a writ *pro. ret. habend.* the sheriff cannot find the cattle, there shall be a *capias in withernam* upon the return of *elongata*. *2 Leo 174.*

So, if after *withernam* in process, the defendant in *homine replegiando* find bail and pleads, and there is judgment against him, and he is surrendered, he shall be detained upon the first *capias in withernam*. *R. Salk. 582.* Or, if he does not

surrender himself, another *capias in withernam* shall issue against him. *Id.*

But, after *withernam* upon a *ret. habend'*, if the defendant tenders in court the damages assessed by the jury, and also a fine for his contempt, the proceedings upon the *withernam* shall be staid. *R. 2. Leo. 174.*

So, after judgment for *return irreplevisable*, if the owner of the cattle or goods renders all that is due upon the judgment, and it is accepted, there shall be a writ of delivery for the cattle, &c. *2 Inst. 107.* So, if he tenders the whole upon the judgment, which is ascertained by the avowry, and is refused, he shall have *detinue.* *Id.*

In replevin in the county-court, removed by *recordari*, and verdict for the avowant, and inquiry as to the value, pursuant to the *stat. 17. Car. 2. c. 7.* the avowant shall not have the replevin-bond delivered to him to sue the parties; but must either have judgment and execution for the sum settled by the jury, pursuant to that statute, or he must take the ancient remedy, which is to have the writ *de retorn' habend'*; and if the sheriff returns *averia elongata*, then a writ to have a *retorn* of the beasts of the pledges; and if that is returned *nihil*, then *scire facias* against the sheriff, *quod reddat ei tot averia.* *B. R. H. 352.*

I have already made a *Qu.* whether, since the *stat. 11 Geo. 2. c. 19.* as the sheriff is bound to make replevin, on good sureties being taken, if he is not guilty of any *laches*, but takes sufficient pledges, who *pendente lite* become insolvent, shall be chargeable, by this mode of proceeding?

29. *Recaption.*

If, pending replevin for a former distress, the lord distrains his tenant again for the same cause, he shall have a *recaption.* *F. N. B. 71. E.*

To *recaption* the defendant does not avow as in replevin, but justifies; for the plaintiff shall not recover damages for the taking or detaining of his cattle, but only damages for the defendant's contempt against law. *1 Rol. 320. l. 10.*

PLEAD.

P L E A D I N G in Scire Facias.

1. *When it lies.**By the Common Law.*

By the common law a *scire facias* lies after a year and a day after judgment given in a real action to execute such judgment. 2 *Inst.* 469. *Adm.* 1. *Salk.* 258.

So to execute a fine. 2 *Inst.* 470.

And upon a judgment in ejectment. *R. Salk.* 258; 600. So in annuity. *Id.*

So in personal actions, if the plaintiff or defendant die within a year and a day, there cannot be an execution before a *scire facias* by or against the executor or administrator. 1 *Rol.* 900. l. 15, 20.

If one plaintiff die, the survivor shall not have execution, before a *scire facias*. *Mo.* 67. *Cont. Noy* 150. *Vide post.* No.

2. The survivor shall not have an execution, by *Elegit*, for the heir shall be contributory. *Per Holt*, 1 *Salk.* 320.

If a recognizance be given for good behaviour, he cannot be indicted for a breach of the recognizance before a *scire facias* upon it; for he may have a plea for his excuse. 1 *Rol.* 900. l. 5.

If a conusee dies, his executor, cannot sue upon the recognizance, to have an *elegit*, without a *scire facias* against the conusor, though it is within the year. *F. N. B.* 267. *D.* Nor if the conusor dies within the year, against his executor, heir, or tenant. *Id.*

But by the common law a *scire facias* does not lie in personal actions after a year and a day after judgment. 2 *Inst.* 469. *Dub. per Holt.* *Salk.* 600. Nor upon a recognizance acknowledged. 2 *Inst.* 469.

It is not necessary where the king was plaintiff. *Salk.* 603.

2. *By the statute W. 2. c. 45.*

By the *stat. W. 2. c. 45.* a *scire facias* was given to have execution upon a judgment in personal actions, after the year and day. *Co. Lit.* 290. *b.* And by the same statute a *scire facias* lies after the year and day upon a recognizance. 2 *Inst.* 670.

A *scire*

A *scire facias* is necessary, where the judgment is superseded by error, though the year and day pass. *Vide post. No. 4.*

It is not necessary, where no alteration of parties is made: as, if one plaintiff dies after judgment, execution may be sued in the name of both, without a *scire facias*. *Noy 150. Sed. qu. de hoc., and vide Mo. 367. cont. vide ante No. 1. and vide infra. Vide stat. 8 & 9 W. 3. c. 11. § 7.*

So, if error is sued and judgment affirmed, and afterwards one of the plaintiffs dies. *R. Mo. 367. Adm. 5 Mod. 339.*

So, if one plaintiff dies, the survivor alone may sue out execution, without a *scire facias*; for he is party to the judgment. *Cont. Mo. 367. R. Acc. Noy 151. Adm. Sho. 404. Adm. Cart. 194.*

So, if error is brought by several defendants, and afterwards one dies, whereby the error is abated, execution may be sued against the others, without a *scire facias*. *Dub. Sho. 404. Semb. 5 Mod. 339. 1 Salk. 319.*

So, if two sue execution by *scire facias*, and one dies after an *elegit* awarded, the survivor shall have an *alias elegit* without a *scire facias*. *R. Cart. 113, 123, 180, 194.*

Yet, where judgment is given and execution delayed beyond the year and day by injunction in *Chancery*, there must be a *scire facias*. *R. 1 Salk. 322.*

If execution is sued after the year and day without a *scire facias*, the execution shall be superseded upon motion. *Mod. Ca. 288.*

A *scire facias* lies of course within seven years after judgment; after that and before the expiration of ten years, there must be a side-bar rule for leave to sue it out; if it's of ten years standing, it must be by motion in court. *Vide Impey's Instr. Cls. B. R. 285, 6. Per Reg. 495. Salk. 598.*

3. *Scire Facias upon Judgment.*

How it shall be sued.

A *scire facias* though it is but a judicial writ, is in the nature of an action, and a release of actions, or of executions, discharges it. *Co. Lit. 290.*

If it is to have execution of a judgment, the judgment must be entered upon record before the *scire facias* sued, and it is not sufficient that it is signed by the officer. *Per Glenn, per Reg. 494.*

If

If after judgment revived by *scire facias*, the defendant dies before execution, there shall be another *scire facias* without motion. *Id.*

A *scire facias* against a defendant says *in hac parte*. *Salk.* 599. Against the bail it says *in eâ parte*. *Id.*

The *scire facias* must be sued in the same court, where judgment was given, if the record remains there. And to the sheriff of the same county, where the original action was. 5 *Com. Dig.* 307.

Upon return of *nulla bona* in the same county, there may be a *testatum scire facias* to the sheriff of another county. 2 *Leo.* 67.

But if a debt, after recovery in *B.* is assigned to the king, a *scire facias* may issue out of the Exchequer. *R. Id.*

A *scire facias* ought to be as short as possible. *Per Reg.* 496. And therefore it is sufficient, though it be as general as the record upon which it is founded. *Mod. Ca.* 296. And an immaterial variance from the record does not prejudice: As, an omission in the stile of the king. *R. 3 Mod.* 227.

But it must recite the judgment that was given. *Cro. El.* 817. And before what judge. *R. Salk.* 517.

If the record is special, it is safe to recite it, as it was pleaded. *Dy.* 34. *b.*

It must be against all the defendants together. *R. Salk.* 598.

A *scire facias pro valore et dampnis* upon a judgment in dower must mention the recovery of seisin. *Off. Br.* 303, 305. By the *stat. Mert.* 1. she may recover the value and damages, *usque diem quo seisinam recuperaverit*. 2 *Inst.* 80.

If a recognizance was taken before a judge, and not entered in court, and the plaintiff declares upon a recognizance in court, it is a variance. *R. Salk.* 564, 659. And such variance cannot be amended. *R. Salk.* 52.

If the *scire facias* be upon a judgment in ejectment, for two messuages, where the judgment was of one messuage. *R. Id.*

It ought to conclude, *quare executionem fieri non debet*, and therefore if *non debet* is omitted, it is bad. *Lut.* 1282.

If the judgment be against two, and one dies, it shall be against the survivor, *quare execution* against his goods, and a moiety of his lands, and against the heir and *tertenants* of the deceased, *quare execution* against them for a moiety of his lands, *habere non debet*. *R. Carth.* 107.

If it be by an excutor, it must make a *profert* of the letters testamentary in the middle or at the end. *R. Carth.* 69.

A *scire*

A *scire facias* against *tertenants*, need not shew by what title they entered *R. 1 Lev. 312.*

It need not recite all the proceedings upon which the judgment was given, but the judgment only. *R. Carth. 149.*

The *scire facias* must not be tested on a Sunday; for it is not *dies juridicus.* *Dy. 168. a.*

Every *scire facias*, to have a *nihil* returned thereon, must lay one day in the sheriff's office, an *alias* must lay four days exclusive, each to have seven days between *teste* and return, if only one, eight days; and every *scire facias*, on which a *scire feci* is to be returned, is to lay four days in the office. *Vide Impey's Instr. Cls. B. R. 286, 287.*

If it has lain four days in the office, summons may be made any time before the court is up, on the return day. *Stra. 644.*

The term of the recovery need not be inserted. *Barnes 431.*

It may be quashed on plaintiff's motion, after appearance, without costs. *Id.*

If defendant pleads to *sci. fa. quare*, &c. that plaintiff should not have his *action* instead of execution, it is well enough. *2 Willf. 251.*

If the defendant dies after writ of inquiry executed, and before the return, and the *sci. fa.* is to shew cause, why a new writ of inquiry should not be awarded, it shall be quashed; for it should be to shew cause, why the damages assessed should not be recovered. *R. on Demurrer. Compton v. Leeds, 13 Geo. 1. C. B. Goldsworthy. v. Southcott. H. 22 Geo. 2. B. R. 1 Willf. 243.*

4. Upon what Judgment.

A *scire facias* lies *quare executionem non* upon every judgment, upon which execution is not sued within a year and a day, if the judgment was not given with a *cessat executio* until such a time, for then the year shall be computed from that time. *Mod. Ca. 288.*

Though execution be sued in part. *Lut. 1264.* So, though execution is sued, but not continued for a year and a day. *2 Leo. 77, 8. Carth. 2.*

It lies upon a judgment in a real action. *Vide ante. No. 1.* Upon a judgment in ejectment, where a stranger enters after judgment. *R. Lut. 1268. 3 Lev. 100. Clift. 676, 7.* So, it lies upon a judgment, *quod computet.* *1 Vent. 258.*

So,

So, if error be brought of the judgment after the year, which is qualshed and void, there ought not to be execution, afterwards, without a *scire facias*; for the writ of error being void, does not revive the judgment. *R. 1 Rol. 899, l. 40.*

So, if there is an injunction out of *chancery*, whereby execution is staid for a year, there shall not be execution afterwards, without a *scire facias*. *R. Mod. Ca. 288.*

But it is not necessary; where the judgment was suspended by error, though a year and a day are passed before judgment affirmed. Nor where the judgment is affirmed within the year, though the execution is sued out of the court where the judgment is affirmed. Nor where the judgment is affirmed, or the plaintiff is nonsuited, or discontinues in error, though the year was expired before error brought. *5 Com. Dig. 308.*

If delay of execution for a year, has arisen from the defendants by bills for injunctions, and by obtaining time for payment, execution may be sued out without a *scire facias*; and if a rule to shew cause why it should not be set aside, be obtained, the court will discharge it with costs. *2 Burr, 660.*

On judgment of *Michaelmas* term, execution was stopt by injunction, and afterwards taken out, tested the last day of the subsequent *Michaelmas* term; but it was held irregular, without a *sci. fa.* A writ of error is matter of record, which the court can take notice of, but an injunction is not. *Stra. 301.*

5. By whom Scire Facias shall be sued.

After a year and day, a *scire facias* lies between the same parties, as were parties to the judgment. *Thef. Br. 224.* If the plaintiff dies, *scire facias* lies by his executor or administrator within a year. *2 Inst 375. Thef. Br. 240.*

If the judgment is by an executor or administrator, *durante minore ætate*, the executor at his full age, may have *scire facias*; for he is privy to the judgment. *R. 1 Rol. 889. l. 2.*

By the *stat. 17 Car. 2. c. 8.* If an executor or administrator, obtains judgment and dies before execution, an administrator *de bonis non*, &c. shall have a *scire facias* upon such judgment.

So,

So, if he dies after the money levied by the execution, and it remains in the sheriff's hands, he may perfect the execution. *R. 1 Salk. 323.*

6. *Against whom it shall be sued.*

If the defendant dies after judgment, a *scire facias* lies within a year against his executor or administrator. *Lut. 1273-4. Thef. Br. 241.*

So, in ejectment it lies against an executor, and a stranger who enters after judgment. *R. Lut. 1268. 3 Lev. 100. Vide ante, No. 4.* Or against tertenants generally, or by special name. *Salk. 600.*

If it be against *A. tenant of the premises*, it shall be intended tenant at the time of the *liberate*. *R. Jon. 90.*

So, if judgment is recovered against an executor or administrator, who dies, a *scire facias* lies upon it against the administrator *de bonis non*, &c. being also administrator of the executor. *5 Com. Dig. 308.*

So, against the executor of an administrator, against whom the judgment was given, if he has wasted the goods of his intestate. *Clift. 679.*

7. *When it does not lie.*

A *scire facias* does not lie where there wants privity: As, by an administrator *de bonis non*, &c. and upon a judgment by an executor or administrator, 'until the *stat. 17 Car. 2. c. 8. Jon. 248. Vide ante, No. 6. Administration. Div. VII.*

Nor by the heir, where his ancestor had sued an *elegit*, *R. Lane 16.*

Nor by the administrator of an administrator upon a judgment by his intestate, for a debt due to the first intestate; though the debt is brought into court, he cannot take it; though he also obtained judgment by mistake, for it is erroneous. *Lat. 140.*

So, it does not lie, though there is privity by him, who has not any interest in the thing recovered: As, if husband and wife recover land in right of the wife, and the wife dies, the husband shall not have a *scire facias* upon the judgment. *Jon. 248.*

So, if husband and wife as executrix or administratrix recover. *R. Id. 1 Rol. 889. l. 10.*

Yet

Yet where husband and wife have judgment for a debt to the wife, the husband alone shall sue execution without a *scire facias*. *R. Mod.* 179.

It does not lie against the heir and *tertenants* of the tenant in dower, after judgment against him, and seisin awarded, if he dies before inquiry of damages. *R. 3 Lev.* 275. Nor by the administrator of the demandant in dower, if she dies before damages and costs assessed. *Dub. Id.*

8. Judgment in Scire Facias upon default.

When without two Scire Facias's.

If upon a *scire facias* the sheriff returns *scire feci*, and the defendant makes default, there shall be judgment against him.

So in *C. B.* if a *scire facias* goes upon a judgment for debt and damages against the defendant himself, who was party and privy to the judgment, and the sheriff returns *nihil*, and the defendant makes default, there shall be judgment against him without awarding a second *scire facias*. *Dy.* 168, *a.* 2 *Inst.* 247. *Salk.* 599.

9. When judgment shall not be without two Scire Facias's.

In all cases where the sheriff returns *nihil* upon a *scire facias* in *B. R.* another *scire facias* shall be awarded. 2 *Inst.* 247. 2 *Mod. Ca.* 227. And if upon the second *scire facias* the sheriff returns *nihil*, and the defendant does not appear, there shall be judgment against him. *Dy.* 168. *a.* 172. *a.* 198. *a.* 201. *a.*

So in a *scire facias* upon a recognizance in *C. B.* there shall not be judgment against the defendant upon his default until two *nibils* are returned. *Dy.* 168 *a.*

Nor in a *scire facias* upon a judgment in *C. B.* where the defendant was not party to the record, as if it be against an executor or administrator, &c. *Id.*

So, if the defendant after judgment takes husband, and the *scire facias* is against her husband and her. *Per C. B.* 5 *Com. Dig.* 309.

Nor in a *scire facias* in *C. B.* for any cause, except upon a recovery for debt and damages against a party to the record, *Dy.* 168. *a.* As, if *nihil* is returned upon a *scire facias* against a *conusee* after judgment in *audita querela* to be relieved

lieved from a recognizance by an infant, there must be a second *scire facias*.. R. 2 Cro. 59.

So, if the *scire facias* is against two, and the sheriff as to one, returns *scire feci* and *nihil* as to the other, there shall be a second *scire facias* against both. *Per tot Cur.* 1 H. 4, 5. a.

If there is judgment against the defendant by default after a *scire feci* returned, he is without remedy though there was no judgment originally given. R. 1 Lev. 41. *Sed qu.?*

If the *scire facias* is against an heir, who, being warned, suffers judgment by default, he shall not have any remedy in law, though his father was only tenant for life, remainder to him in fee. R. *Id.* So, if the remainder was in tail. *Id.* 1 Sid. 54. Ray. 19.

So, in any case, where he has matter pleadable to the *scire facias*. 1 Salk. 264.

But after judgment upon two *nibils* returned, the defendants may be relieved upon motion without an *audita querela*. 1 Salk. 93, 264.

After two *nibils* and *scire fieri* inquiry, *devastavit* returned, and traversed; if the defendant does not apply in a reasonable time, the court will not relieve on motion. *Stra.* 1075.

10. Pleas to a Scire Facias.

What are allowed.

To a *scire facias* the defendant may plead in abatement, or in bar. 2 Inst. 470.

So *aide*, *receipt*, and *age*, shall be allowed. *Id.*

But process of summons, attachment, and for a view are ousted by the *stat. W.* 2. c. 45. *Id.*

So *essoyn* of tenant, defendant, *prayer in aid*, or plaintiff himself. *Id.* So protection shall not be allowed. *Id.*

The defendant cannot plead matter contrary to the title, upon which the recovery was obtained. *Id.* Nor a thing which proves the judgment only erroneous and voidable. *Id.*

11. To a Scire Facias upon a Judgment.

In Abatement.

The defendant may plead in abatement to a *scire facias* upon a judgment, that there are not 15 days between the *teste* and the return. *Lut.* 25.

So

So he may plead *quod non tenet* specially, as that he has only for years. *R. 3 Lev. 205. Co. Ent. 620, 624. a.*

But general *non-tenure* is no plea. *R. 3 Lev. 205. R. Cro. El. 872. R. Salk. 601.*

Where tenants are returned tenants of several parts, they cannot join in a plea of seisin in another. *R. Salk. 601.* So they cannot plead *non-tenure* by implication; as, *that such an one is seised of the freehold. R. Id. That he holds jointly with B. R. Mo. 524.*

That there was no scire facias against the other defendant. Salk. 598. R. 2 Cro. 506-7. That there are other tertenants not named. R. 2 Sand. 8, 23. R. Mo. 525.

That there are tertenants in another county against whom there is no scire facias. R. 2 Vent. 104. Clift. 672.

But such plea shall conclude, *si respondere debet*; for it is not directly in abatement. *5 Com. Dig. 310.* And if it be that there are other tertenants in another county, it shall not say, *not named, nor returned. R. 2 Vent. 105.*

This plea after a plea in bar does not avail. *Jon. 319.*

Upon such plea, the plaintiff may take a new writ against other tertenants. *2 Sand. 23.*

If the return does not say that *A. B. &c.* are all the tertenants, it is bad. *R. 1 Salk. 598.*

12. In Bar.

By an Executor or Administrator.

To a *scire facias* against an executor or administrator, the defendant may plead in bar that he had fully administered *die impetrationis* of the *scire facias*. *Off. Br. 253. 2 Sand. 220.* So he may plead *ne unques* executor. *Mod. Intr. 367.* So, judgment against him upon a prior *scire facias* upon a *scire fieri* inquiry and *devastavit* returned. *Cro. El. 886.* Or such prior *scire facias* pending, and no subsequent assents. *R. Id.*

A plea of *plene administravit* and *nulla bona* will be bad upon a special demurrer. *5 Com. Dig. 311.* He ought to plead, *nothing in his hands. Skin. 565.*

The defendant may plead *nul tiel record. Mod. Int. 368.*

By the *stat. 4 & 5 Ann. c. 16.* payment may be pleaded, if the defendant hath paid the money due on the judgment.

The defendant may plead a thing which shews the writ to be mistaken. As, if a *scire facias* upon a judgment against

against *A.* and *B.* is brought against the administrator of *B.* as survivor, he may say that *A.* survived. *R.* 1 *Salk.* 262. So he may plead a release to the testator or himself. 3 *Lev.* 272. Or a release by the executor of the plaintiff. Or by one executor or administrator, or to one executor or administrator. *Id.*

But, it is no plea, that by deed the plaintiff agreed that, if he obtained judgment, he would not take out execution if the defendant paid 100*l.* which money he has paid; for there can be no defeasance of a judgment before it is given. *R. Cro. El.* 837.

It is not any plea to a *scire facias* upon a judgment against himself, that there is another judgment against the testator unsatisfied; for he might have pleaded it to the action against him. *Dy.* 80. *a. in marg.* *R.* 1 *Salk.* 315.

Nor is it any plea, that the bond, upon which the judgment was obtained, was upon an usurious contract. *R.* 1 *Sid.* 182.

The defendant may plead outlawry of the plaintiff before the first judgment in battery, &c. for though it was no bar to the action, because the damages were uncertain, yet it shall be a bar to the *scire facias*, when the judgment has ascertained the damages. *R. Jon.* 239.

So the defendant may plead, that the plaintiff's testator became *felo de se.* 1 *Sand.* 355.

That error is depending upon the original judgment. *Skin.* 590.

So he may plead, that the plaintiff levied debt and damages by *fieri facias* against the testator. But it is not a good plea, that the plaintiff levied part by *fieri facias*, and agreed to accept 10*l.* at such a day for satisfaction of the residue, which was paid accordingly; for payment is no plea to debt upon record. 5 *Com. Dig.* 311. This was at common law but now since the *stat.* 4 & 5 *Ann. c.* 16. § 12. payment may be pleaded.

That the testator took him by *ca. sa.* in execution and afterwards permitted him to go at large. *Vide Off. Br.* 300. *Salk.* 271.

That he obtained judgment in *C. B.* upon the same judgment. *R. Cro. El.* 817.

13. By an Heir.

To a *scire facias* against an heir, he may plead, *riens per discent.* *Dy.* 344. *Cro. Car.* 295. Or, pray that the pa-
rol

rol may demur, (*i. e.* that the suit may stand still,) if the heir is within age. 2 *Inst.* 390. *Cro. Car.* 295. And, if it is found against the heir, there shall be execution against him for a moiety only, and not for the whole; for the heir is charged only as *tertenant*. 5 *Com. Dig.* 312. *Vide* the *stat.* 3 *W. & M. c.* 14. which hath very much altered the law, as to actions against the heir.

If there are several heirs, as *parceners*, in *gavelkind*, &c. and a *scire facias* is against one only, he shall have contribution against the others. 3 *Co.* 12. *b.*

So, if part of the land descended to the heir on the part of the father, other part to the heir on the part of the mother. 3 *Co.* 13. *a.*

But, it is no plea, that before the *scire facias*, the heir levied a fine to the use of himself in fee. *Semb. Co. Ent.* 622. *b.* So, if the heir alone is charged, he shall not have a *scire facias* against a purchaser. *R.* 3 *Co.* 12, 13.

If there be a *scire facias* against an heir, or *tertenant*, after judgment against the ancestor, he shall not plead any matter in avoidance of the judgment, though the judgment was by *nil dicit*: as, that *A.* for whose sufficiency the ancestor was bound, was sufficient. *R. Sav.* 25. *b.*

If judgment be against *A.* and *B.* and one dies, a *scire facias* lies against the survivor, and it is no plea that the deceased hath an heir to whom assets descended. *R.* 1 *Lev.* 30.

If the *scire facias* be against both, he may take execution, after judgment against both, by *elegit* or by *fieri facias*, against the survivor only. *Id.*

14. By *Tertenants*.

To a *scire facias* against a *tertenant*, he may plead in bar any thing, which shews his lands not liable to execution: As, that the defendant in the original action enfeoffed himself, or others, under whom he claims, before the judgment, with traverse of the seisin at the time of the judgment or ever after. *Off. Br.* 251. If there be a traverse of the seisin and issue thereon, he shall be adjudged to be seised, though he made a *feoffment*, if it was with an intent to defraud creditors. *R. Hob.* 72.

That the original defendant was not seised of the lands in their possession. Or, that he was tenant in tail, and died, and his issue levied a fine to the *tertenant*, *Co. Ent.* 621.

That

That the defendant in the judgment was not seised in fee. *Thes. Br.* 272, 273. 289.

That he enfeofed the *tertenant*, and before judgment disfeised him, whereupon the *tertenant*, after judgment re-entered. *Off. Br.* 302.

Tertenants may plead, that they have nothing but a reversion after a term for years, and pray judgment, *si executio* during the term. *Clift.* 671.

A *tertenant*, may plead, *nul tiel record*, or, a release to him by the plaintiff. *5 Com. Dig.* 312.

But it is no plea for a *tertenant*, thrt the heir hath asssets; for though the plaintiff may sue execution against the heir alone, without naming the purchaser; yet, it is not of necessity. *2 Inst.* 396. *Semb. Co. Ent.* 620.

That no *scire facias* was awarded against the executors; though they have asssets. *Semb. Dy.* 208. *a.* Nor, no *scire facias* against him as heir, but as *tertenant* only; though he was heir. *R. Cro. El.* 890. *Sir Christ. Heydon's case.*

15. By the Defendant himself.

To a *scire facias*, after the year and day against the defendant himself, he may plead *nul tiel record*. *Off. Br.* 279. That the debt was levied by *fieri facias*. *Clift.* 675.

He cannot plead, that the warrant of attorney was given upon an usurious contract. *Stra.* 1043. *B. R. H.* 233.

16. Scire Facias upon a recognizance.

A *scire facias* may be sued upon a recognizance given in *chancery*, against the conusor himself. *2 Sand.* 6. Or, against his heir, or *tertenants*. So, against them upon a recognizance in *B. R.* or *C. B.* Or before the chief justice, or other judge out of court.

So, after the debt satisfied, a *scire facias ad computandum* lies by the conusor against the conusee. *5 Com. Dig.* 313.

If a conusor dies, a *scire facias* may be sued against his heir. *1 Rol.* 900. l. 35. And it may be sued against him without the *tertenants*; for he shall have no contribution any more than the conusor himself. *Id.* l. 37. *2 Inst.* 396. Or, it may be sued against the heir and *tertenants*. *Cro. Car.* 295.

If it be returned, that there is no heir, or that the heir is dead, or that he was warned, and not otherwise, it may be sued against the *tertenants*. 1 *Roll* 905. l. 45.

If the conufee extends only part of the lands of the conufor, the *tertenant* may have a *scire facias* in the nature of an *audita querela* against him, or an *audita querela* at his election. *R. Jon.* 90.

A *scire facias* upon a recognizance must pursue the recognizance. But if it concludes, *quare executionem non*, &c. *juxta formam recuperationis prædictæ* instead of (*recog'n*) it shall be amended, for it is furplufage. *R. 3 Mod.* 251.

Scire facias against bail in error, on a judgment for damages, must be to shew cause, why plaintiff should not have execution of the debt aforesaid, (the specific sum in the recognizance) not of the damages. *Wilf.* 98.

Scire facias in the petty-bag, will lie on a bond given to the late king, his executors and administrators, as within 33 *H. 8. c.* 39. 2 *L. Ray.* 1327. *in chancery*.

It cannot be tested the same day the party makes default. *Stra.* 1220.

17. *Scire Facias for other causes.*

If a judgment be reversed after execution, a *scire facias* lies for the defendant against the plaintiff for the money recovered. *Jon.* 326.

If there be judgment in error to reverse a fine, a *scire facias* lies against the *tertenants*, and it lies before or after judgment in the discretion of the court. *Hard.* 163, 4.

If there be judgment for the plaintiff in replevin, and a return is not made, a *scire facias* lies against the pledges. 2 *Mod. Ca.* 313.

A *scire facias* in replevin, will lie on a plaint, or on a writ. One may be bail with others for himself; if *alangat* is returned for the principal, the pledges may be sued; if the writ of inquiry is reducible to a certainty, it is enough; and discontinuance is nothing in this suit, unless it had been void or a nullity. *Fort.* 330.

18. *Judgment on a Scire Facias.*

Judgment in *scire facias*, depends upon the original judgment; for if this is reversed the judgment in *scire facias* does not stand in force. 3 *Mod.* 187.

Judgment on a *scire facias* cannot give damages for delay of execution; but if it does, it may be reversed for that, and affirmed *pro residuo: on error in B. R. affirmed in parliament.* *Stra.* 807. *L. Ray.* 1532.

But, if it is found, that plaintiff is *damnisfied*, and put to costs to 6*d.* it is well, for it is only meant as a foundation for the costs *de incremento*. Damages may mean costs. 3 *Burr.* 1789.

ACTION upon STATUTE.

I. When it lies.

1. For a recompence.

Upon every statute, made for the remedy of any injury, mischief, or grievance, an action lies by the party grieved, either by the exprefs words of the statute, or by implication. And such action shall be, for a recompence to the party, or by way of prohibition.

By the *stat.* 36 *Ed.* 3. *c.* 9. If any man find himself grieved contrary to the articles therein above written, or others contained in divers statutes, and will come to the *Chancery*, and complain, he shall there have remedy by force of the said statutes, *viz.* by original writ out of *Chancery*.

And therefore, where by the *St. M. Ch.* 9 *H.* 3. *c.* 29. it is enacted, that no freeman shall be taken, or imprisoned, &c. unless by the law of the land, if any be imprisoned contrary to law, he may have an action founded upon this statute.

So, a man aggrieved contrary to the *stat. M. Ch.* 9 *H.* 3. *c.* 35. which enacts, that the sheriff shall make his torne, only twice in the year, &c. shall have an action upon this *stat.* though no action be expressly given. So, upon other clauses of *Magna Charta*.

Or, contrary to the *stat.* of *Marlberge*, 52 *H.* 3. *c.* 10. If a man be distrained to come to a leet, who need not. So a man shall have an action upon the *stat.* of *Marlberge* 52 *H.* 3. *c.* 15. If he be distrained out of the fee, or in the highway, contrary to this statute.

So a demandant or plaintiff, a tenant or defendant, who is delayed, or prejudiced by the sheriff's returning jurors, who are above 70 years of age, infirm, or not commorant in the same county may have an action for it upon the *stat.*

Westm.

Westm. 2. c. 38. So an action upon the *stat.* lies for the party grieved upon every remedial branch of the *stat. Westm. 2.* for his relief. *1 Com. Dig. 243, 4.*

The meaning of an application to *Chancery* for relief, is, for a special original; but the party grieved, may equally sue, in either of the courts at *Westminster*, by common process.

2. For recovery of an Advantage.

An action lies upon the *stat. 32 H. 8. c. 4.* for money devised to be paid out of lands; for in all cases, where a man hath an advantage given to him by force of an act of parliament, he shall have a remedy for it by common law, without the aid of a court of equity. And the action upon the *stat.* shall be maintained against the *terre-tenant.* *1 Com. Dig. 244. 6 Mod. 26. Salk. 415.*

3. What averments are necessary in an Action upon a Statute

If an action be founded upon a statute, the plaintiff must aver every matter, which is requisite to intitle him to an action. But where, by the proviso in a statute a person is excepted within such circumstance, and not in the body of it, the plaintiff need not shew, that the defendant is not within the exceptions; for that shall come from the other party. *1 Com. Dig. 244.*

4. By way of prohibition.

So, sometimes the party aggrieved contrary to a statute, shall have a remedy by action upon the statute, by way of prohibition: as, if a feoffee be distrained for several services, which are not contained in his charter of feoffment, contrary to the *stat. of Marl. 52 H. 3. c. 9.* he shall have a writ of *contra formam feoffamenti*; which is a writ of prohibition to the lord, or his bailiffs to distrain him. *1 Com. Dig. 244.*

II. When an action does not lie upon a Statute.

But if a statute prohibit a thing to be done, an action does not lie against him, who proceeds in a course of law to contend, whether such a thing be prohibited, or not. As, if a

man sue in the spiritual court for tithes of gross trees, an action does not lie upon the *stat. 45 Ed. 3. c. 3.* which enacts, that tithes shall not be paid of them; nor upon the *stat. 32 H. 8. c. 7.* which enacts, that none shall sue for them; for a man may contend, whether the trees, of which the tithes are demanded, are gross trees or not. 1 *Com. Dig.* 245.

III. When an Action lies upon Statute, or at Common Law.

If a statute gives a remedy in the affirmative (without a negative expressed, or implied) for a matter, which was actionable by the common law, the party may sue at the common law, as well as upon the statute; for this does not take away the common law. As he may have trespass at the common law for spoiling his park, or, an action upon the *stat. de malefactoribus in parcis.*

Trespass for mayhem, or, appeal of mayhem upon the statute.

If the action concludes, contrary to the form of the statute, (where it lies at the common law, or upon a statute) and the statute is mistaken, whereby the declaration will be bad upon the statute, but good by the common law; the words, contrary to the form of the statute, shall be rejected. So, if there be no statute, and the action is maintainable only by the common law.

So, if an indictment be against three, and one only is within the statute; it shall be good against the others at the common law, and *against the form of the statute* goes to him only, who was guilty within the statute.

But if a man bring his action at the common law, he waives his remedy by the statute. 1 *Com. Dig.* 245.

IV. When it does not lie in the Courts of Westminster.

By the *stat. 21 Jac. c. 4.* All offences to be committed against any penal statute, for which any informer may ground any action, suit, information, &c. before justices of assize, *nisi prius*, gaol-delivery, *oyer and terminer*, or justices of peace in quarter-sessions, shall be sued before the justices of assize, *nisi prius*, gaol-delivery, *oyer and terminer*, or justices of peace of every county, borough, &c. having power, &c. wherein such offence shall be committed, at the choice of the parties, who will sue, and not elsewhere: and all informations, actions, &c. hereafter commenced by the Attorney

ney General, a common informer or other person in any of the courts of *Westminster*, for any of the said offences shall be void.

And therefore, debt does not lie in any of the courts of *Westminster* for an offence within another county, though it cannot be sued elsewhere; for the offence may be prosecuted before justices of assize, &c. though not by such action. *Vide 1 Com. Dig.* 246. for various authorities *pro et con.* In the 10th of *W.* 3. it was ruled according to the doctrine here laid down, by eleven judges, and so I conceive the law to be established. *Vide 1 Salk.* 373.

So an information does not lie in the courts of *Westminster*, where it can be brought before justices of assize, &c. *Semb.* 2 *Cro.* 85. *R. Carth.* 465. *1 Salk.* 372.

But the *stat.* 21 *Jac.* c. 4, by a proviso in the same statute, does not extend to any information or action upon statutes against popish recusants, or for recusancy, or for maintenance, champerty, or buying of titles, or on the statute of tonnage or poundage, or for defrauding the king of his customs, subsidy, impost, prisage, or for transporting gold, silver, ordnance, ammunition, &c. wool, or leather.

So it does not extend to an information for an offence not determinable before justices of assize, &c. as upon the *stat.* 23 *H.* 8. c. 4. for raising the prices of beer, &c. or, upon the *stat.* 21 *H.* 8. c. 13. for non-residence. So it does not extend to debt upon any subsequent statute, which gives a remedy by debt. But it must be laid in the proper county. *Vide Action. Div.* XI. No. 10. *1 Com. Dig.* 246.

In a *qui tam*, for exercising a trade without having served an apprenticeship, laid at *Cambridge*, *B. R.* staid proceedings. *Stra.* 415. The *stat.* 21 *Jac.* 1. c. 4. restraining the jurisdiction of *B. R.* to actions arising in the county where *B. R.* sits. *V. Salk.* 373.

V. Action upon Statute, by *qui tam*, &c.

How it shall be brought.

1. By Information, or Original.

Actions upon statutes are, at the suit of the king only; viz. by indictment, or information; or, at the suit of the party, who sues as well for our lord the king, as for himself; or, at the suit of the party alone.

By

By the *stat.* 18 *El.* c. 5. (which does not extend to suits by persons, to whom or to whose use any forfeiture, penalty, or suit is specially limited by any statute, but where it is limited generally to him that will sue) none shall be admitted to pursue against any person, upon any penal statute, but by information, or original action, and not otherwise.

And therefore, none can sue upon a penal statute by plaint in an inferior court.

Nor by bill of debt in *B. R.* *R. Cro. El.* 77. *R. Mo.* 247, *S.* 412. *R. 1 Rol.* 537. l. 30.

Nor by bill in the *exchequer*, *quo minus*, &c. *Semb.* 3. *Leo.* 237.

But, I doubt the law of these two cases, as I conceive the bill of *Middlesex*, in *B. R.* and the *quo minus* in the *exchequer*, are original actions; So, the *lat.* in *B. R.* which always supposes a bill of *Middlesex*, previously sued out; and see the following cases.

Where a *stat.* gives a penalty to be recovered by action of debt, bill, plaint, or information; an action by *qui tam*, may be by bill in *B. R.* as well as by original, or information; for the words of the *stat.* 18 *El.* c. 5. are (*original action*) and the bill in *B. R.* is an original action there. *R. 1 Rol.* 537. l. 15.

So, an action by the party grieved upon a penal statute, may be by bill in *B. R.* for the *stat.* 18 *Eliz.* c. 5. does not extend to him: As, in an action upon the *stat.* 32 *H.* 8. c. 9. against maintenance. Or upon the *stat.* 5 *El.* c. 9. against perjury. So, debt upon the *stat.* *W.* 2. and 1 *R.* 2. c. 12. against a sheriff for an escape, lies in *B. R.* by bill against him in custody of the marshal, though the statute limits the recovery by writ of debt, which imports an original; for it is within the equity of the statute. So an action upon the *stat.* of *premunire* lies by bill, though the statute speaks of garnishment by the space of two months, which implies, by original.

So an action upon the *stat.* 13. *R.* 2. c. 5. and 2 *H.* 4. c. 11; for suing in the admiralty, where the cause arises upon land; though the statute speaks of a writ upon the case. So, an action upon the *stat.* of *Winton*, 13 *Ed.* 1. against an hundred; for the inhabitants may be in custody of the marshal.

In what county it shall be brought, *vide action*, *Div.* XI. No. 10. also *ante Div.* IV. 1 *Com. Dig.* 247.

Upon motion, proceedings shall be staid untill the plaintiff give notice of his place of abode; if he is out of the realm,

realm, proceedings shall be staid until his return, or until security given for the costs. *Stra.* 697.

An affidavit of the cause of action, accruing within the year, need not be filed, in an action upon the *stat.* of usury. *12 Ann. stat. 2. c. 16.*

The declaration may be *qui tam*, though the bill of *Midlesex* is not so. *Stra.* 1232.

[It hath lately been determined by *B. R.* that upon a general writ, the plaintiff may declare as executor, or administrator, &c. but not *vice versa*.]

If the process is *qui tam*, and the declaration not, it is irregular, for it alters the nature of the demand. *Barnes* 494.

[So that now the practice of each court, is decidedly settled, to be uniform in this respect.]

The plaintiff's attorney may be ordered to give defendant an account of the plaintiff's place of abode, even after trial and point reserved. *Barnes.* 126.

An informer may bring an action in his own name, without *qui tam*, for a forfeiture, whereof a moiety goes to a turnpike. *Barnes* 471.

2. When an Action lies by *Qui tam*, &c.

An action by *qui tam*, &c. was brought against *B.* before whom he was indicted of felony, for not allowing his pardon until submission to the duke of *Lancaster*. *27 Ed. 3. 1 Rol. 1. A.*

If a man be rescued, when taken upon a *capias utlagatum* at the suit of *A.* he may have an action *qui tam*, &c. So, if he escapes, an action lies against the sheriff by *A. qui tam*, &c. So, if a sheriff refuse to execute a *capias utlagatum*, and return *non est inventus*.

Yet, for such escape, &c. the party may have an action, without saying, *qui tam*, &c.

So an action by *qui tam*, &c. lies for a battery of the king's chaplain in his presence.

So, it lies in every case, where the damage is to the king, as well as to the party.

So an action upon a statute, which prohibits a thing, but does not give any penalty, must be by *qui tam*, &c. and not by the party alone: As, upon the *stat. 32 H. 8. c. 7.* which prohibits the suing for tithes of gross trees. Upon the *stat. 2 R. 2. c. 5. de scandalis magnatum.* Upon the *stat. 13 R. 2. c. 5. & 2 H. 4. c. 11.* for suing in the Admiralty, &c. *Vide Cro. Jac. 134.*

An action by *qui tam*, &c. must be to answer to the party who sues, as well for our lord the king, as for himself. Or, to answer to our lord the king and the party, who as well, &c.

But an information shall say only, That the party, who sues as well for our lord the king, as for himself, &c.

If the action be by the king and the party, but the king is not to have any part of the sum recovered, but only his fine, *qui tam*, &c. may be omitted in the issue, and *venire facias*.

So, if the action be by *qui tam*, &c. and the issue be joined, that he does not owe to the party only, it is good.

So, if demurrer be joined as to a declaration only by the party, *qui tam*, &c.

An action by *qui tam*, &c. is the suit of the informer, and not of the king. And the party *qui tam*, &c. may be nonsuited. 3 Lev. 378. Lut. 196.

He shall pray a *tales*, though he has no warrant by the attorney general. 3 Lev. 398.

A conviction upon an indictment, &c. will be a bar to an action by *qui tam*, &c.

The attorney general cannot enter a *nolle prosequi*, except for the king's part.

It must pursue all the requisites by the *stat. 18. Eliz. c. 5.* in the case of a common informer.

The action shall not be discontinued by the demise of the king.

If the plaintiff die after verdict, his executor, or administrator, shall have judgment for his moiety. If he dies after judgment, and his death is suggested upon the roll.

The defendant may plead privilege, as an attorney of another court.

The defendant may have *nisi prius*, by proviso. *Semb. 2 Leo. 210. [Qu. de hoc?] 1 Com. Dig. 247, 8.*

On affidavit of defendant's poverty, the court will give leave to the prosecutor, *qui tam*, to compound with the defendant, though in execution. *Stra. 167.* It is in the discretion of the court, whether they will give leave to compound; and they refused it in an action for selling gold rings of less fineness than *stat. 18 Eliz. c. 15.* directs. *Wils. 79.* If *qui tam* is brought by the party injured, the court cannot give leave to compound. *Barnes, 462.* But it seems a general rule, not to give leave to compound after verdict. *Ib.*

VI. *Action upon Statute by the Party grieved; when it shall be.*

If by a statute, a penalty be expressly allotted to the party grieved, he alone may sue for it, without saying *qui tam*, &c. as upon the *stat. 1 & 2 P. & M. c. 12.* for driving a distress out of the county. So, upon every statute which gives a penalty to the party grieved. So, if it do not give any certain penalty, but damages generally to the party grieved.

So, though it do not limit the forfeiture to the party grieved, if it give the penalty, or forfeiture, in respect of the wrong, or dispossession of the property of the owner, or do not limit it to any other: As, upon the *stat. 2 Ed. 6. 13.* which says, None shall carry away tithes, before he hath set forth the tenth part of the same, or agreed for it with the owner, under pain of forfeiture of treble value. *Vide Debt. Div. I. No. I.*

So, if a statute provide a remedy for the party grieved, though it do not give any express penalty or forfeiture, he may have an action upon the statute. As, upon the *stat. W. 1. c. 20.* against misfeasers in parks or fishponds; the owner may maintain an action in his name alone, as well as by *qui tam*, &c.

So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for a thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law.

An action by the party grieved, is not within the *stat. 18 Eliz. c. 5.* as a common informer. *1 Com. Dig. 248, 9.*

VII. *When a Statute shall be recited.*

If an action lies for an offence at common law, and afterwards a statute is made against the same offence, if the action is brought upon the statute, the statute must be recited, otherwise it does not appear, whether the action be upon the statute, or at common law. As, in an action upon the *stat. 5 R. 2. st. 1. c. 8.* and *8 H. 6. c. 9.* for a forcible entry or detainer. In an action upon the *stat. W. 1. c. 20.* *De malefactoribus in parcis.*

So, if a statute make a new offence, which was not so by the common law, the statute must be recited. As, in waste against tenant for life, or years. *1 Com. Dig. 249.*

VIII.

VIII. When it need not.

But if a statute extend a remedy, which was at common law in some particulars, it need not be recited. As, in waste against a tenant in dower or guardian, the statute need not be recited; for there was a prohibition of waste against them at common law. So, in debt by an executor, or administrator *de bonis asportatis*, &c. the statute is not rehearsed; for debt lay at common law in other cases.

So, in an action upon the *stat. 2 R. 2. c. 5. de scandalis magnatum*, the statute need not be recited. *Vide Action upon the case for Defamation. Div. II. No. 3.*

In an assise for tithes, the *stat. 32 H. 8. c. 7.* need not be rehearsed. So, the title, or preamble need not be mentioned. So, where a statute gives a writ, and ordains the certain form of the writ, the statute need not be rehearsed.

So, if the action be not founded upon a statute directly, but upon a collateral fact, the statute need not be recited: as, in a *quare impedit* by the king upon a simoniacal contract, the *stat. 21 Eliz. c. 6.* need not be recited.

When a statute need not be recited, it is sufficient, that the plaintiff in his declaration shews his case to be within the purview of the statute, and concludes against the form of the statute.

If he misrecite the beginning of the statute, and conclude contrary to the form of the statute generally, it will be well. *Vide post. Div. IX.*

If it be founded on several statutes, contrary to the form of the statute is bad.

But, where an offence is prohibited by several statutes, if only one is the foundation of the action, and the others are explanatory, it is sufficient to say, contrary to the form of the statute.

In an information for 20*l.* a month for not coming to church: for several statutes require the resorting to church, but the *stat. 23 Eliz. c. 1.* only gives the 20*l.* per month.

If there be debt by an assignee for a debt to a bankrupt, by force of the statute is sufficient. *1 Com. Dig. 249, 50.*

In actions by assignees, they are generally alledged to be such, according to the force, form and effect of the statutes made, and now in force concerning bankrupts.

If a declaration conclude contrary to the form of the statute, where there is no statute in the case, it will be surplussage. If a declaration conclude so, where there are several trespasses, and only part within the statute, the words, contrary

trary to the form of the statute, shall be applied only to that part. 1 *Com. Dig.* 250.

IX. *How a Statute shall be recited.*

If an act of parliament be recited or pleaded, the day, year, and place of the making of it must be shewn. If the plea mistake the day of the commencement, or conclusion of the parliament, it will be bad. Though it be in a private act, and *nul tiel record* is not pleaded; for the court *ex officio* will take notice of the commencement, prorogation, and every session of parliament, and consequently, (if they are mistaken) that there is not any such act. If the session was held by prorogation, the shortest and surest way of pleading is, at a session of parliament held such a day, and year, in such a place. For, if a parliament commenced the *fifth* of *Eliz.* and was prorogued to the *eighth* of *Eliz.* and then the act passed, if it be pleaded, at a parliament held the *eighth* of *Eliz.* it is bad. So, where the parliament was summoned 23 *Jan.* 1 *Eliz.* and, then prorogued to 25 *Jan.* if it be pleaded, that by a statute in a parliament begun 2; *Jan.* and then prorogued until the 25 *Jan.* it was enacted, &c. it was bad; for the parliament did not commence till 25 *Jan.* *Dyer* 203. a.

It is proper here to observe, that on consulting *Dyer*, I find that the queen was ill, and the parliament having sometime previous to the 23 *Jan.* been summoned to meet on that day, she by patent writ under the Great Seal bearing date the 21 *Jan.* prorogued the parliament (as the book says) whereby the appearance of the Lords and Commons at the 23d was discharged.

Had the parliament met on the 23d, and then been prorogued, I should have considered that as the first day of the session, and held the pleading good.

If it be pleaded, by a statute made the 2 *Nov.* 2 & 3 *Ed.* 6. it is bad; for the same day cannot be in two years. So, if a statute be pleaded to have been made 29 *Eliz.* where the parliament commenced 28 *Eliz.* it will be bad. Or, at a session 18 *Feb.* 14 *Car.* where the prorogation was to 18 *Feb.* 15 *Car.* 1 *Com. Dig.* 250.

If an act is passed at a parliament held by prorogation, I think the proper way of pleading is, to say, at a parliament begun and held on such a day, at such a place, and from thence continued, by prorogation, (or by several prorogations) until, &c.

If

If a declaration be upon a general statute, and conclude contrary to the form of a *stat.* made 2 *H.* 8. where it was made in another reign, or in another year of the same king, it will be bad.

It is sufficient, that so much of a statute is recited, as concerns the matter in question, and therefore, if it be said, it was among other things enacted, it is well. If the party recite so much of the statute, as makes for him, it is sufficient; though he omit a proviso, or other clause that makes against him. 1 *Com. Dig.* 250.

For that shall be shewn, (if necessary) by the other party.

If, in the recital of a statute there be a material variance, it is bad; as, if the time or place of the making of it be mistaken. If it be recited in conjunctive words, where it is in disjunctive. If the party recite the title of an act, and it be mis-recited; though the recital was not necessary. If in a recital of the *stat.* 8 *H.* 6. *c.* 9. If any feoffment or discontinuance thereof be made, *thereof*, be omitted.

But a small, or immaterial variance does not prejudice: as, if an act say, if a recovery be in any *courts*, and it is recited, in any *court*. So, where it is a material variance from a general statute; if the declaration conclude contrary to the form of *the statute in such case made*, and not, contrary to the form of *the statute aforesaid*, it is well.

So, if a *stat.* mis-recited in the commencement, &c. be admitted by the plea, &c. it shall not afterwards be assigned for error. 1 *Com. Dig.* 250, 1.

A mistake in the commencement of a parliament is cured by concluding contrary to the form of the statute in such case made and provided. *Fort.* 372. *Stra.* 212.

Plea of an act of insolvency. 2 *Geo.* 2. whereas the parliament began 1 *Geo.* 2. held nought. *Fort.* 372.

Plea of an act of 8 & 9 *W.* it should have been of the 8th year, in which the session began. *Fort.* 372.

As to amendment in actions and informations on penal statutes, *vide* 1 *Com. Dig.* *tit. Amendment*, (2 *C.* 2.)

PROCEEDING IN ACTIONS UPON SEVERAL STATUTES.

When an action lies upon a statute, or not, *vide* *Action upon Statute*, *Div. I.* No. 1. *Div. II.*

How it shall be sued by *qui tam*, &c. or the party grieved, *Vide* *Action upon Statute.* *Div. V. VI.*

When

When the statute shall be recited or not and how, *Vide*
Action upon Statute, Div. VII, VIII, IX.

I. Upon the Stat. 2. (or 2 & 3) Ed. 6. c. 13. for Tithes.

1. By whom it lies.

Action of debt lies upon the *stat. 2* (or 2 & 3) *Ed. 6. c. 13.* for the treble value for not setting out his predial tithes.

But it must be by the party alone, and not by *qui tam*, &c. And may be by the rector, or by the farmer of the rectory. And may be by an executor for not setting out tithes in his testator's time.

So, it lies by the husband alone, seised in right of his wife, for tithes arising after his marriage. 5 *Com. Dig.* 200 cites *cont. Noy 136.* But I conceive *Noy* is wrong.

Or husband and wife may join. *R. Noy 136. Adm. Mo. 912.*

So it lies by a farmer of two parts of a rectory by one title, and of the third part by another title; for he declares as farmer, and need not mention the title.

So, by two farmers of the same rectory. But two, who claim by several titles, cannot join in debt upon this statute. As if one claims two parts, and the other the third part of the same rectory. 5 *Com. Dig.* 200.

2. Against whom.

Debt lies on the *stat. 2* (or 2 & 3) *Ed. 6. c. 13.* against two jointenants, who occupy together. *R. Hut. 121.*

Or against one jointenant, or tenant in common, only, if he occupies the whole. *R. Ibid.*

3. The Declaration.

The plaintiff in his declaration need not recite the statute. And if it be recited to be made at a parliament 4 *Nov. 2 Ed. 6.* when the parliament began 1 *Ed. 6.* and so was prorogued 'till 4 *Nov. 2 Ed. 6.* yet it shall be allowed, for there are several precedents so.

And if it be recited that whereas he agreed with the rector, farmer, or other proprietor, where the statute says, *other owner, proprietor, &c.* so *owner* is omitted, it is not material.

The

The plaintiff, in his declaration, need not shew any title; for it is sufficient to say, *that whereas he was rector, &c. or farmer and proprietor of the tithes, &c.*

And, if he shews a grant to himself, he need not say, it was by deed, though tithes cannot be granted without deed.

So, if he claims by lease under the king's patentee, he need not shew the patent.

So, it is sufficient that the plaintiff alledges himself *proprietor*. So, if he says *that he is proprietor of the tithes and of 60 acres in D.* without saying which is certain.

So, it is sufficient if he says that he is rector of *A.* and by *reason thereof*, ought to have tithes out of the parish of *B.* which is another parish.

The plaintiff in his declaration usually alledges that he is *proprietor*, &c. that the defendant occupied lands within the parish, and sowed them, and reaped and carried away his grain, without setting out the tithes, or agreement with the rector, &c. for them.

So, if he claims as rector, &c. he must alledge the tithes taken to belong to the rectory.

But the non-payment of the treble value is the *gist* of the action, and the possession, and the whole declaration precedent, is but inducement, and therefore if it be alledged as recital, the declaration is good. So the declaration is sufficient, though it does not shew that the defendants occupy jointly or in common.

Though it does not shew the kinds of grain sown. 5 *Com. Dig.* 200, 201. cites as to the last point *R. 2 Cro.* 438. *Sed qu. de hoc.* If there had been a special demurrer. The case in *Cro.* was after verdict.

Nor by whom it was sown. Or if it alledges the time of the severance before the sowing. Or more than a year after; for it is possible.

So, if it does not alledge the time of severance, but says, that *30 Sept. being so thereof possessed, he reaped*; for it shall be intended that he severed the same day, on which the possession is alledged. So, if the day of severance be coupled with the removal of the grain. Or, if the term was expired before the day alledged of the removal.

So, if the quantity of land sown and the quantity severed, vary: as, if he says *which said 30 acres for 40*, the word *thirty* shall be rejected as surplusage.

So, if the declaration does not say, that the defendant did not agree with the plaintiff, it will be good after verdict, though

though not upon a demurrer. So, it is sufficient that the declaration demands the single value, for it shall be trebled by the jury or court. And if it adds the treble value, and it is mistaken, it will be good. *Vide 5 Com. Dig. 201.*

He must alledge a venue, where the tithes are stated to be carried away without severance, for this is the *gift* of the action.

So, it is sufficient, if he alledges the value of the tithes to be 11*l.* and so an action hath accrued to have for the treble value 32*l.* The miscasting is no prejudice. *R. 2 Cro. 499.*

So, if he alledges that the defendant is occupier, it is sufficient, though he does not say that he is a subject; for it implies as much. *R. Hard. 173.*

So, if there be too plaintiffs, and they alledge that the defendant did not agree with them, it is sufficient without saying *or either of them*, for it is implied. *R. 2 Cro. 70.*

4. The Plea.

To debt upon this *stat.* the defendant may plead *nil debet.* Or may plead *Not Guilty.*

So, an agreement with the plaintiff for his tithes for three years, though it be not by deed; for it will be good between the parties, and shall be a bar by the statute, though it does not pass the right of the tithes.

But a plea, that after the tithes were set out, the owner of the soil took them *damage feasant*, is not good; if it does not shew how long they remained on the land.

II. Action upon the Statute 1 R. 3. c. 3. for Seizure of a Felon's Goods before Conviction.

If an action be brought upon the statute of 1 R. 3. c. 3. for taking the goods of one accused of felony before conviction, the plaintiff must recite the statute, and shew the breach. *Lut. 132.*

III. Action upon the Statute 1 & 2 Ph. & M. c. 12. for 5*l.* for driving a distress three Miles, &c.

If an action be brought upon the *stat.* 1 & 2 Ph. & M. c. 12. for driving a distress out of the hundred, &c. above three miles, the defendant may plead *not guilty.* *Co. Ent. 44. b.*

So

So he may plead that the taking was by *capias in withernam*. *Co. Ent.* 44. a.

IV. Action upon the Statute 8 H. 6. c. 9. for a forcible Entry.

If an action be upon the *stat.* 8 H. 6. c. 9. for a forcible entry, or detainer, the plaintiff in his declaration must recite the statute. *Lut.* 1548. *Co. Ent.* 44. b. *Vide action upon Statute Div. VII.*

To this action the defendant may plead *not guilty*. *Cl. Ass.* 34.

That he did not enter contrary to the form of the statute. *5 Com. Dig.* 202. cites *Co. Ent.* 46. a. *Sed. qu. if this does not amount to the general issue?*

That he did not expel or dispossess the plaintiff. *5 Com. Dig. Ibid.*

V. Action upon the Statute 23 H. 6. c. 8. for being Under-Sheriff two Years together.

If an action be upon the *stat.* 23 H. 6. c. 8. for using the office of under-sheriff two years together, the plaintiff must recite the statute, and the offence. *Lut.* 193. *Lev. Ent.* 135.

He need not aver that the sheriff had no estate of freehold in the office. *Semb. Lut.* 197.

VI. Action upon the Statute 21 H. 8. c. 13. against a Spiritual Person.

1. For taking a Farm.

If an action be upon the *stat.* 21 H. 8. c. 13. against a spiritual person for taking a farm, the plaintiff must recite the statute *Lut.* 135. *cont. Bro. Action sur Statute* 4. *Vide Action upon statute, Div. VII.*

To this the defendant may plead *not guilty*.

That, not having glebe, he took it for the support of his family. *Lut.* 136.

That he did not hold the farm contrary to the statute *5 Com. Dig.* 202. cites *Sav.* 32. *Sed. qu. if this does not amount to the general issue?*

And

And upon the last plea he may give in evidence that it was for the support of his family. *Per 2 J. Baldwin. cont. Bro. Action sur Statute. 3 Sav. 32.*

2. For Non-Residence.

If an action be upon the *stat. 21 H. 8. c. 13.* for non-residence, it is usual to recite the statute. *Rol. Ent. 414. Lut. 138.*

VII. Action upon the Statute 33 H. 8. c. 9. for using unlawful Games.

If an action is brought upon the *stat. 33 H. 8. c. 9.* for using unlawful games, the plaintiff may recite the statute and shew a breach. *Lut. 133.*

To this action the defendant may plead *that he did not keep a gaming-house, &c.* *Lut. 134.*

VIII. Action upon the Statutes 13 R. 2. *stat. 1. c. 5.* and 2 H. 4. c. 11. for suing in the Admiralty, for a Matter not *super altum Mare.*

If an action be upon the *stat. 13 R. 2. stat. 1. c. 5. & 2 H. 4. c. 11.* for suing in the admiralty, for a thing not done *super altum mare*, it must be by *qui tam*, &c. *Dy. 159. b. Vide Action upon statute, Div. V. No. 1. &c.*

The plaintiff in his declaration must surmise the effect of the libel, and suggest that the matter arose *within the body of a county*, and not upon the high seas. *Dy. 159. b.*

And in actions upon these statutes, the party shall recover double damages, and the king 10*l.* *Ibid.*

And the costs as well as the damages shall be doubled. *Ibid.*

IX. Action upon the Statute 8 El. c. 2. for suing in another's Name, without his Consent.

If an action be upon the *stat. 8 Eliz. c. 2.* for suing in another's name, without his consent, the plaintiff must recite the statute, and shew the offence. *Lut. 156.*

And it well lies, though there be no conviction before, for the proof may be in the same action. *R. 2. Cro. 188.*

But an attorney is out of the statute. *Semb. Lut. 169 Sed. 2. de hoc?*

So, it does not lie for a suit in *C. B.* for it is not mentioned in the statute. *R. Lut. 169.*

X. *Action upon the Statute 2 W. & M. c. 5. for Rescous of a Distress.*

If an action be for *rescous* of a distress upon the *stat. 2 W. & M. c. 5.* the plaintiff must shew the demise, distress for rent arrear, and *rescous*. *Lut. 213.*

He must shew the whole substance of the lease. *5 Com. Dig. 204. cites Semb. Mod. Ca. 215. Sed 2. de hoc?*

And, if he says that he was seised in fee, and leased, he must prove a seisin in fee. *R. Mod. Ca. 215.*

But, he need not say that notice was given; for it is nothing to the defendant, though necessary to the owner. *R. Lut. 214.*

Nor, that the corn distrained was threshed or unthreshed. *R. Lut. 214.*

He need not shew a thing, collateral to the lease, as, that he gave a quarter's warning. *Per Holt. Mod. Ca. 215.*

XI. *Action upon the Statute 4 & 5 W. & M. c. 8. for apprehending Highwaymen.*

If an action is brought upon the *stat. 4 & 5 W. & M. c. 8.* against the sheriff for non-payment of the allowance for apprehending highwaymen, &c. the plaintiff must recite the statute, and every thing that intitles him to the allowance within the statute. *Clift. 120.*

T R E S P A S S.

I. *Trespass, what shall be.*

1. *To Lands and Tenements.*

Trespass is a wrong done to the person, to the lands and tenements, or to the goods and chattels, of another man.

Trespass to the person may be by menace, assault, battery, or *mayhem*. Or by false imprisonment.

It will be a trespass done to another, if a man wrongfully enters the house, lands, or tenements of another, without his

his consent: (*i. e.*) illegally; and therefore, trespass lies, for breaking and entering his house. Or his close.

So a trespass may be to lands or tenements, by entry into his possession. *F. N. B.* 92. *A. B.* 2 *Rol.* 555. *X.* By treading down, spoiling, eating, &c. his corn, grass, hay, &c. Cutting down trees. Hunting in his close. Breaking down fences. Throwing down, or disturbing the setting up of his fold. By breaking up a pond.

So, if a man enters, and does damage to another, though he does not keep the possession: As trespass lies, *wherefore, he broke and entered his house, or close.*

So, trespass lies for a wrong to lands, contrary to a trust reposed in him: As, if a lessee at will, cuts down timber, or commits voluntary waste. *Co. Lit.* 57. *a. R. Sav.* 84. So trespass lies for a wrong to his liberty or privilege in land; as for entering his warren, and chasing, &c. hares, &c. and taking and carrying away his hares, &c. *F. N. B.* 86. *M.* For breaking and entering his several or free fishery, and fishing, &c. *R. Skin.* 342. 4 *Mod.* 186. *F. N. B.* 87. *G.*

If a person keep goods distrained in the house, longer than the time directed, he is a trespasser for the surplus time. *Stra.* 717. *L. Ray.* 1424.

2. To Goods and Chattels.

If a man wrongfully takes the cattle, goods, or chattels, of another, it will be a trespass: As, if he takes the horse, ox, or other cattle, or live chattel. Or his furniture, or dead chattel. For taking away a ship. *F. N. B.* 87. Doves out of his dove-house. Hares, pheasants, &c. out of his warren. Deer out of his park.

It lies for taking the wife with the goods of the husband. *F. N. B.* 89. *O.* Of a servant taken away, with the goods of the master. 2 *Rol.* 551. *l.* 34.

So, it lies of charters taken, though they concern the freehold or inheritance. Of a bond or other writing taken. 2 *Rol.* 557. *l.* 40. But, in the last case, *detinue* is the proper action, as the thing is recovered in *specie*.

Trespass lies for taking 100 shillings of his money, in money numbered. *F. N. B.* 87. *M.* Of timber. *Id.* *D.* Of the goods of a felon taken by the sheriff. *Id.* 91. *F.* Of goods wrecked, taken before seizure. *Id.* *D.*

So, trespass lies for an unlawful distress of goods. *Id.* 90. *B.* For goods taken until he make fine, release, &c. *Id.* 87. *C.*

For goods destroyed, as, a mill-stone broken. *Id.* 88. *L.* Sheep driven by a dog, whereby they were rendered less valuable. *Id.* 89. *L.* Hogs driven, so that they perished. *Id.*

Of hay, or other chattels burnt. *Id.* 88. *N.* A vestment spoiled, by throwing wine upon it. *R. Noy.* 48.

Trespas lies, for assaulting, beating, and wounding plaintiff's mare. *Barnes,* 452.

3. *Trespas for a general Wrong.*

Trespas lies for a general wrong done to another: As, if a man takes the servant of another out of his service, and keeps him.

If *A.* rescues a man out of the hands of an officer, who arrested him for me, for he was my servant for such purpose. *5 Com. Dig.* 536.

If he builds a tool-booth, upon my land, without saying, *clausum fregit.* *R. 2 Cro.* 122. If a miller takes toll of him, who ought to be free of toll; for it is *tantamount* to having taken his corn. *2 Rol.* 556. *l.* 10. If a man beats the servant of him, who ought to have toll, and obstructs his taking of toll. *R. 2 Cro.* 122.

Trespas lies for taking a son and heir, and marrying him, or a daughter and heiress. *F. N. B.* 90. *H.* Of a prisoner taken in war. *Id.* 88. *A.* 91. *E.*

II. *By whom Trespas lies.*

1 *Trespas, quare Clausum fregit.*

Trespas, *quare domum*, or *clausum fregit*, lies by him who hath the possession of an estate of freehold, or inheritance, or by lease for years, or at will. *2 Rol.* 551. *l.* 47, 54. So tenant at will, may have trespas against him who ousts him. *Semb. Id.* *l.* 45. I conceive there is not a doubt, as to all the world, except the landlord.

Tenant by sufferance, may maintain trespas against a stranger. *Id.* *l.* 42.

So, it lies by him who hath only *vesturam terra*, or the profit of the land. *Co. Lit.* 4 *b.* *R. Mo.* 302. Or, the herbage of the land. So, by a lessee of the pasture of such a close. By a grantee of underwood, though the soil does not thereby pass. *5 Com. Dig.* 536.

So, it lies by a grantee or lessee of the king, of the issues of one outlawed. *3 Leo.* 213. *Mo.* 302.

But

But a commoner shall not have trespass, *quare clausum fregit*. *Cro. El.* 421. Nor he who hath a warren in land. *Id.* Their remedy is by special action on the case. With respect to the warren, that must be, where it is merely an entry, and none of the property *carried away or injured*; for in either of these cases, I apprehend trespass would lie.

Trespass lies by a freehold-tenant in a manor, for digging turf in his turbary, where he hath an *exclusive right* to the turf, though not to the feeding on it; not, if he had only common of turbary. 3 *Burr.* 1824.

Trespass lies by the owner of the soil, for erecting a stall in a market. *Stra.* 1238. *Wils.* 107.

2. What shall be a sufficient Possession.

If a man has possession only as lessee for years, or at will, it is sufficient to maintain trespass against a wrong-doer.

2 *Roll.* 551. l. 47. 54.

A copyholder shall have trespass for trees cut upon his land. *Id.* l. 50. A disseisee shall have trespass against a disseisor, without re-entry, for the first entry; for the disseisee was then in possession. *Id.* 553. l. 50. *Co. Lit.* 257. a.

So, if his estate determines whereby he cannot re-enter. As, if he was tenant *pur autre vie*, &c. he shall have trespass for the whole time, with a *continuando* against the disseisor. *Id.* 550. l. 15. 20. If a disseisee re-enters, he shall afterwards have trespass against the disseisor, with a *continuando* for the whole time of his possession.

Or against a stranger for a trespass done during the disseisin, for by re-entry, he reverts the possession in himself, *ab initio*. So, against a lessee, donee, or feoffee, of the disseisor. If a man sells his land, he shall have trespass for a wrong done before. 5 *Com. Dig.* 537.

3. What shall not be a sufficient Possession.

A plaintiff cannot maintain trespass, *quare clausum fregit*, if he has not actual possession, though he hath the freehold in law: As, an heir shall not have trespass against an abator. If the heir enters upon an abator, he shall not have trespass against him for the wrong before. 5 *Com. Dig.* 537.

If a wife, tenant for life, leases for years, and dies, the reversioner shall not have trespass against the lessee, before entry. *Id.* Nor the heir, if an husband, seised in right of his wife, leases, and then the wife dies. 2 *Roll.* 552. l. 3.

A bar-

A bargainee shall not have trespass before entry, though the possession is transferred to him by the statute. *Carth.* 66.

4. *What shall be a sufficient Possession for Goods.*

Not only he who has the property, but also he, who has the possession of goods, shall maintain trespass for the goods: As, if a man hath cattle to agist, he shall have trespass against him, who takes them. *2 Rol.* 551. *l.* 25. So a lessee of cattle for a year, for composting his land, shall have trespass against a stranger. *Id.* *l.* 20. Or against the lessor himself, if he takes the cattle within the year. *Id.* *l.* 22. So a bailee of goods awarded. *Id.* *l.* 31. So a bailee of goods pledged to him. *20 H.* 7. *1. a.*

So, if a stray in the manor of *L.* be taken within a year by a stranger, *B.* shall have trespass. *Id.* If a man takes the goods of *B.* who afterwards grants them to another, yet *B.* after the grant shall have trespass for them. *2 Rol.* 557. *l.* 52.

If a man sells goods in *London* to *A.* in *York*, *A.* shall have trespass before actually taking possession; for the possession is immediately in him. *Lat.* 214.

An executor shall have trespass for the goods of his testator, though he does not say, that they were taken out of his custody, for the possession upon the death of his testator is vested in him. *Per 2 J.* 2 *Cro.* 113.

Trespass lies for goods taken after delivery by *replevin*. *2 Rol.* 569. *l.* 17. Or after re-taking by the owner. *Id.* *l.* 25. Or after his lease or interest determined. *Id.* *l.* 30. It lies by a sheriff for taking goods in his hands upon execution before sale. Tho' the taking be by the defendant himself against whom the execution was. *R. Cro. El.* 639.

Trespass lies for the master of a ship, who had the possession, and was taken for the voyage, for a detainer of it. *R.* 1 *Salk.* 2. So trespass lies for goods taken, thought they are afterwards altered in form.

5. *General Trespass, by whom it lies.*

Trespass lies by the party to whom the wrong is done, Tho' the damage to him be only by consequence; as, it lies by an husband alone for the battery or threatening of his wife, *per quod consortium amisit*, or *negotia infecta reman*, &c. *5 Com. Dig.* 538. So it lies for the battery of a servant, *per quod servitium amisit*. *Id.* So, even after the death of the servant.

servant. 2 *Rol.* 568. l. 42. By an husband after the death of his wife, for taking away his wife, with his goods. *Id.* 563. l. 12. Or after a divorce. *Id.* l. 10.

So by the *stat.* 4 *Ed.* 3. c. 7. An executor or administrator shall have trespass for a prejudice to the property of the testator. *Vide Administration, Div. II. No. 13.* And by the *stat.* 25 *Ed.* 3. c. 5. The executor of an executor.

But trespass does not lie for a battery, &c. to the person of the testator, by his executor or administrator. *Vide Administration. Div. II. No. 13.*

Nor by an husband after the death of his wife, for a battery to the wife. 2 *Rol.* 568. l. 50. Nor by a father for the battery of his son. 5 *Com. Dig.* 538. or the imprisonment of a son or daughter. *Id.* Nor for taking away any son or daughter, who is not an heir. *R. Cro. El.* 770.

If a wrong be done to several at the same time, trespass lies for each severally, for the wrong to him; for trespass is several in its nature. 3 *Lev.* 354.

Trespass lies for one hurt by the accidental going off of a gun. *Stra.* 596.

A plaintiff in trespass, for an assault by the defendant to whom she was married, proves a former marriage to one alive at the time of the second marriage, and obtains a verdict. *Stra.* 79.

III. *Against whom it lies.*

1. *Trespass quare Clausum fregit.*

Trespass lies against him, who commits the trespass, and all aiding, &c. for there is no accessory, but all are principals in trespass. And trespass lies against each severally, where many commit a trespass; for it is joint and several in its nature. 5 *Com. Dig.* 539.

So it lies against *A.* together with divers other unknown. *R.* 1 *Leo.* 41. So against all who procure or command it. 4 *Inst.* 317. Or against him, who afterwards assents to a trespass done for his use or benefit, tho' not privy at the time of doing it. *Id.* So, if he assents to the act of his servant in seizing goods, he will be a trespasser for misusing of the goods in seizure, tho' not privy to the misusage. *R. Lane* 90.

Trespass lies against *A.* who comes in aid of *B.* tho' he does nothing. 2 *Rol.* 555. l. 7. Or if he commands *B.* to do the act, though he be not present. *Id.* l. 10.

Trespass lies against *A.* if his wife puts his cattle into the land of another. *Id.* 553. l. 30.

If

If the sheriff, by his order, takes in execution the goods of a stranger. *Id.* l. 5. 10. *Dy.* 295. *Keilw.* 119, 129.

But if a servant puts the cattle of his master, *without* his privity, into the land of another, trespass lies against the servant, and not against the master. 2 *Rol.* 553. l. 25.

If the bailiff of a franchise takes the goods of a stranger in execution, trespass lies against him, not against the sheriff. *Id.* 552. l. 44. *Sed. qu?*

So, if the bailiff of a sheriff detains in custody after a *superfedeas*, trespass lies against him, and not against the sheriff. *R.* *Id.* l. 45. So if the sheriff takes a furnace, &c. fixed to the freehold, trespass lies against him, but not against the party, tho' it is delivered to him. *R.* *Id.* 556. l. 50.

It is said if the sheriff does not return his writ, &c. trespass lies against him, but not against the party, or bailiff. 5 *Com. Dig.* 539. *Sed. qu. de hoc?* And, if trespass would lie, could not the sheriff return his writ, and file the return, before he pleaded to the action? By trespass must be meant trespass on the case, though in *Comyns* this is ranged under *trespass quare clausum fregit*.

An action upon the case lies against the sheriff, if he does not return the writ. 2 *Inst.* 453.

If a man receives him who has committed a trespass, knowing him to have done so, he is no trespasser.

If a man commits a trespass by mistake, or inadvertency, trespass lies against him: as, if a sheriff or bailiff takes the goods of one instead of another. 2 *Rol.* 552. l. 17, 22. Or arrests *A.* instead of *B.* *Id.* l. 25. or attaches *A.* by the goods of *B.* or of his masters. *Id.* l. 20. Tho' it be by shewing of the party to the suit. *Id.* l. 30. *Dy.* 295. *Keilw.* 119, 129.

If an executor cancels an obligation of his testator to *A.* which he finds, supposing that it is satisfied. *R.* 2 *Rol.* 563. l. 45. If a man's cattle escape into the land of another, against his will. *Id.* 568. l. 15.

Trespass lies against *A.* if cattle in his custody commit a trespass. *Id.* 546. l. 20. or against the owner of the cattle at the plaintiff's election. *Id.*

The court will not join declarations in trespass against separate persons, on an affidavit that the trespass, if any, was committed by all jointly; for that would deprive the plaintiff of the benefit of the evidence of one against the other. *Stra.* 420.

Trespass lies against a tenant in possession, after judgment against the casual ejector, for the mesne profits, from the time he had notice of the lessor's title, tho' he lets judgment

ment go by default, and his name does not appear in the record of judgment against the casual ejector. *R. by all the Judges. 2 Wils. 115.*

But trespass does not lie against a man not consenting or aiding to it: As, if *A.* strikes an horse upon which *B.* is riding, whereby he throws down another, trespass does not lie against *B.* *Salk. 637, 8.*

Trespass does not lie against a lord, because his distress is unreasonable, or carried into another county; for by the *stat. Marl. 4. non puniatur per redemptionem*; but there shall be an action upon that statute. *2 Inst. 105, 6.* Nor by the equity of the statute by a lessee for years against the lessor. *20 Ed. 4. 2, 3. R. Dalt. 3.* Yet it lies, if the lessor spoils or destroys the goods. *20 Ed. 4. 3 a.*

2. What Act makes a Man a Trespasser ab initio.

If a man has an authority of licence given him by law, and he abuses it by misfeasance, he shall be a trespasser *ab initio*: as, if a man who takes a distress, works, or kills it. *8 Co. 146.* If a lessor, who enters to view if waste be done, damages the house. *2 Rol. 501. l. 27.* Or stays there all night. *Id.*

If a commoner enters to view his cattle, and cuts down trees, &c. *8 Co. 146. b.* If a searcher unpacks stuffs, and puts them in the dirt, whereby they are damaged. So if his servant or assistant, does it, without his direction. If a man enters a tavern, and continues there all night against the will of the taverner. If a man will impark goods distrained after amends tendered. *5 Com. Dig. 540.*

If the lord of a manor works a stray within the year. *R. 2. Rol. 562. l. 15.* Or the lord of a fair, or market works an horse distrained for toll. *Id. l. 20.*

So, if the bailiffs of a town who by custom seise an hide, for non-payment of a customary duty for hides of all oxen killed and sold within the town, tan it, to prevent putrefaction. *R. Id. l. 25.*

If a sheriff or any in his aid, make *replevin* after a claim of property notified to him by the owner. *R. Mod. 68, 139.* If an escheator takes the goods of one outlawed after a writ *de non molestando* shewn to him. *3 H. 7. 1.*

So, if a man abuses a trust or confidence reposed in him, he will be trespasser, *ab initio*: as, if lessee at will commits voluntary waste, by throwing down an house, cutting down trees,

trees, &c. 5 *Com. Dig.* 540. If a shepherd kills sheep committed to his care. *Co. Lit.* 57.

Or for a special purpose, as to plough, or dung his land. 2 *Rol.* 556. l. 5.

If a servant, or assistant, intrusted to sell goods in a shop, imbezzles them. *R.* 1 *Lev.* 87. *R. Mo.* 248.

So, if a man has colour of an authority, and afterwards it is vacated and declared to be null, he will be a trespasser *ab initio*: As, if a man obtains judgment irregularly, and afterwards takes out execution, the party, (though not the officer) will be a trespasser, if the judgment be vacated. *R.* 1 *Lev.* 95. but *Twisd.* dub. 2 *Sid.* 125. *Vide Bayly v. Bunning.* 1 *Lev.* 17. 1 *Sid.* 271. The difference between officer and party.

So, if a man has power given him by act of parliament, and does not pursue, or abuses his power: As, if a man having authority by the *stat.* 2 *W. & M. c.* 5. to sell a distress for rent, if it be not replevied within five days after notice, &c. sell it without notice. *Adm.* 4 *Mod.* 391.

If a man puts cattle, which he impounded *damage-feasant*, into the next pound which happens to be in another county, it does not make him a trespasser, but he is subject to the penalty of the *stat.* 1 & 2 *P. & M. c.* 12. *Stra.* 1272.

Beasts dying after put in the pound, does not make a man a trespasser, *ab initio*; but case will lie. 2 *Wils.* 313.

IV. When Trespass does not lie.

A man shall not be charged in trespass for goods, which he had by the delivery of the party himself, except where by a wrongful act, he makes himself a trespasser, *ab initio*: As, if *A.* deliver goods to *B.* for custody, who afterwards will not re-deliver them, trespass does not lie against *B.* 2 *Rol.* 555. l. 27. 40. But *trover* or *detinue* will lie.

If *A.* permits his goods to remain with *B.* for his own use, and *B.* delivers them to *C.* to carry to another place, trespass does not lie by *A.* against *C.* *Id.* l. 35. Nor for goods which come to him by authority in law. *Id.* l. 43. *Vide ante Div. III. No.* 2. As if *A.* take goods by delivery of the sheriff upon a *replevin*. *Id.* l. 45. p. 565. l. 45. Or takes them upon an execution, though it be not regularly made. *Id.* 556. l. 50. Upon a sale. *Id.* l. 52.

If a constable take goods waived for the use of the owner, tho' he afterwards refuses to deliver them to him, trespass does not lie, but *detinue*. *R.* 2 *Rol.* 555. l. 50. 561. l. 40.

Nor

Nor for goods which a man takes only for security for the use of the owner: As, if goods are thrown by tempest into the sea, and a stranger takes them, and delivers them to the servant of the owner for him. *Id.* 555. *l.* 47. So the master of a barge in a tempest may throw goods into the sea, for the safety of the passengers. *R.* *Id.* 567. *l.* 5. Nor for goods which a man has lawfully, tho' the possession of him, from whom he had them, was wrongful: as if *A.* takes the horse of another and sells him to *B.* trespass does not lie against *B.* *Id.* 556. *l.* 52.

If a man hath a licence or authority from the plaintiff himself, trespass does not lie against the defendant, though he abuses his licence by misfeasance. *R.* 8 *Co.* 146. *b.* So, if a man hath licence or authority by law, and afterwards does not do what he ought, trespass does not lie against him; for non-feasance does not make him a trespasser, *ab initio.* *R.* 8 *Co.* 146. *b.* As, if, after a distress, the rent or sufficient amends are tendered, trespass does not lie; though the party refuses delivery of the goods distrained. *Id.* If a man comes into a tavern, or common inn, and afterwards refuses paying for wine. *R.* *Id.* If a sheriff after an arrest refuses bail.

So trespass *quare clausum fregit*, or general trespass, does not lie, where damage is done to a privilege or liberty, which a man hath in the soil of another, but he may have an action upon the case: As, a commoner shall not have trespass for damage done to the soil, or grafs. 5 *Com. Dig.* 342.

If a man hath free warren in the land of *B.* he shall not have trespass, for that he broke down the burrows of his free warren, &c. whereby his conies, &c. perished. *R.* 2 *Rol.* 550. *l.* 45. So, trespass does not lie, where the damage accrues to the goods by his own neglect, or default: As, if *A.* gives licence to *B.* to put hay, &c. upon his land, until it can be sold, and afterwards leases the land to *C.* Trespass does not lie by *B.* if his hay be consumed by the cattle of *C.* for he ought to secure the hay at his peril. *R.* 2 *Rol.* 143. 152.

Trespass does not lie, where the act is not against the peace, or wrongful, but the effect of cunning or contrivance: As, if a man procures the servant of another to go out of his service, and then retains him, but does not take him away. 2 *Rol.* 556. *l.* 17. So trespass does not lie against a servant, if he departs out of the service of his master. *Id.* *l.* 20.

Trespass does not lie for a lawful act, though in consequence, damage is done to another: As, if a man fixes a spout

spout to his house, which, upon rain, throws water upon the wall of another; but there may be an action upon the case. *R. 2 Mod. Ca. 272.*

So trespass does not lie for an act which is felony: As, for a battery, of which the party dies within a year. *2 Roll. 557. l. 5. Vide action upon the case. Div. II. No. 5.*

Trespass does not lie for taking goods, which was a robbery; if it appears to be a felonious taking. If it appears upon evidence, for breaking an house, and taking money, for which he was convicted of burglary.

But, if a man prosecutes for the felony, and the party is acquitted, or burnt in the hand, he may have trespass; for he hath done what the law required against the party for the felony, and then the trespass remains. So, if the defendant pleads a conviction of felony, it is no bar, for the plaintiff was not a party; and therefore, not estopped by the record. *5 Com. Dig. 542.* To the last point, says, *Semb. 2 Rol. l. 557. l. 10.* So, if he pleads a conviction uncertainty. *R. per 3 J. Jon. 147. Lat. 145.*

In trespass for taking goods, if it does not appear by the declaration, &c. that the taking was felonious, the defendant cannot say so. *R. 1 Mod. 283.*

Trespass does not lie against a man for taking goods which he found. *R. 2 Rol. 555. l. 50.* Unless after finding, he embezzles the goods. *Id. 563. l. 45.* Trespass does not lie for throwing down a nuisance. *Id. 565. l. 50.*

So, trespass does not lie, if cattle enter the close of another, for want of repair of the fences. *Id. l. 30.* Nor, if a man enters land to drive back his cattle, escaped thither for want of fences. *Id. l. 35.* Or, to drive back wild beasts, escaped for want of paling against a forest. *Id. l. 40.* Or, to retake his goods carried thither by the occupier of the land. *Id. l. 54.*

But, it is not justifiable to enter land with cattle, because it lies open to the highway. *Id. l. 47.* Or to enter to search for goods stolen, without reason of suspicion that they are there. *Id. l. 15.* Or to enter upon a common report, that his trees dug up are carried thither, that not being felony. *Id. 564. l. 30.* This is at common law. But now by several statutes, cutting and carrying away various trees, and under different circumstances, is made felony. *Vide tab. to stat. tit. trees, and the Black Act. 9 Geo. 1. c. 22.*

It is not justifiable to enter for retaking goods, which he, who holds them in common with me, put there; for though a tenant in common, may retake goods in common, when
the

the other takes them, yet he cannot justify a trespass to do it. *R. 2 Rol. 566. l. 30.*

Trespass is not excused on pretence of charity: As, if a mother enters the house of another, to visit her sick daughter there, without asking leave. *Id. 567. l. 15.* Or on pretence of sport: As, for the hunting of a fox, or badger, *R.* Though it be for the public good. *2 Rol. 558. B. Sed qu?* If a man sets a falcon at a pheasant in his own land, he cannot pursue it into the warren of another. *Rol. 567. l. 30.* Such is the common law, but unless the defendant, in either of the cases, is a wilful trespasser, a plaintiff will have little chance of recovering damages, sufficient to carry costs.

Trespass does not lie for seizing an house in the *East Indies*. *Stra. 646.*

Nor for taking *excessive* distress; but a special action on the statute of *Malbridge*. *Stra. 851. 1 Burr. 579.* Unless the distress is of gold or silver, which are of a certain known value, and even the measure of the value of other things. *Moir v. Munday. H. 28 G. 2. cited in the case of Hutchins v. Chambers. 1 Burr. 579.*

It lies not for a father, for assaulting and getting with child his daughter, *per quod servitium*, &c. if she was of age, and away from her father's house, in service; but, if she was under age, and under her father's roof, it lies. *3 Burr. 1878.*

But, if a man imprisons me, of his own wrong, I may justify the breaking of windows or doors to get out; for it was his fault. *1 Rol. 566. l. 5.* If a man by neglect, suffers his house to be on fire, I may pull it down for the safeguard of mine adjoining. *Id. l. 3.*

If a man takes a handful of grain from my heap, I may take as much from his heap. *Id. l. 12.* If a man throws his grain or money to my heap, I may take the whole. *Id. l. 15. Sed qu. as to money?*

If cattle or goods are *damage-feasant*, I may drive or remove them out of my close, *Id. l. 20. 35. R. 4 Co. 38. b.*

But I cannot kill or damage them. Nor can I kill a tumbler hunting in my warren. *R. 2 Rol. 567. l. 35.*

If a man sell me all his trees, I shall have liberty to come upon the land, to cut them down, and carry them away, when I please. *R. Id. l. 40. Vide Hatton & Neale, per Jones Ch. J. 1683. Bull. Ni. Pri. 3 Ed. 90.*

I conceive the party must enter at a seasonable time, and in reasonable time, after the purchase.

A gran-

A grantee of a water-pipe, &c. shall have liberty to metid it. 1 *Rel.* 567. l. 45. An executer has liberty to enter to take the timber of the deceased. *Id.* 564. l. 25. A reversioner, &c. to view waste, if he does not break a door or window. *Id.* 568. l. 5.

If cattle, in passage on the highway, eat herbs, or corn, *raptim* & *sparsim* against the will of the owner of the cattle, it will excuse the trespass. *Id.* 556. l. 55.

If an act in the first instance be unlawful, trespass lies; if it be *prima facie* lawful, and the prejudice to another not immediate but consequential, trespass doth not lie, but an action upon the case. Thus, *A.* enters *B.*'s yard, having right so to do, and there fixes a spout to his own house, from which the rain runs into *B.*'s premises, and rots his walls. *R. on demurrer & ult. concil.* that trespass does not lie. *Str.* 634. 2 *L. Ray.* 1399. *Fort.* 212.

Pleading in Trespass.

1. *The Original.*

Trespass is *vicontiel*, which gives commission to the sheriff to hear and determine in his county. *F. N. B.* 85. *V.* And thereon he may determine trespass to any value. *Id.* And it shall say *vi et armis.* *Id.*

Or trespass may be sued by a writ directed to the sheriff, and returnable in *B. R.* or *C. B.* *Id.* 86. *H.* And this writ shall always say *vi et armis.* *Id.*

If it be for taking a live chattel, the writ usually says, took and *led away.* *Id.* 88. *B.* If for a dead chattel took, or *carried away.* *Id.*

If for immoveable chattels, *to the value, &c.* *Reg.* 93. *b.* If for moveable chattels, *of the price, &c.* *Id.*

But took and *led away*, and *carried away*, may be used promiscuously for live or dead chattels. So *price* or *value*, may be used promiscuously for a live or dead thing. 5 *Com. Dig.* 314. But there is certainly more propriety, in the terms used antiently in these cases.

If the price or value be omitted in trespass for taking cattle, it is not fatal; for they may be returned. *Reg.* 97. *b.* So the omission does not prejudice in any case after verdict. *R.* 1 *Sid.* 39. 2 *Vent.* 174. Nor upon a general demurrer. *Semb.* 2 *Cro.* 147. *cont.* 2 *Lev.* 230.

2. *Process.*

The process in trespass is attachment, and distress, and if upon the attachment or distress the sheriff returns *nihil*, a *capias*, *alias*, *pluries* and *exigent*, and process to outlawry. 1 Brownl 193.

If at the return of the attachment, the defendant does not appear, nor cast an essoin, he shall lose the goods attached. *Id.* If he casts an essoin, he shall have a writ to the sheriff for restitution of his goods. *Id.* Though he does not appear at the day to which the essoin is adjourned. *Id.*

The common mode of proceeding, is, now, by service of copy of common process, as in *B. R.* of a bill of *Middlesex* or *latitat*; in *C. B.* of a *capias*. But if any one sues by attachment, the above is the law. I have only to add, that in many actions given by statute, the essoin is taken away.

3. *Declaration.**In what County alledged.*

In trespass *quare clausum fregit*, the venue must be in the county where the land lies: In other words it is a *local* action. And so, for any local trespass. But for battery, taking of goods, &c. it may be in any county. *Vide Action, Div. XII. No. 12.*

4. *The declaration must be direct, and positive.*

The declaration must be direct and positive; and therefore, if the plaintiff declares *That whereas* defendant, &c. it is bad, for nothing is directly affirmed. 5 *Com. Dig.* 314. That is, if the defendant demurs.

So, if the plaintiff declares *quare eum*, &c. *R. Salk.* 636.

But *quod cum* is well enough after *verdict*, though it might be bad on demurrer. 1 *Wils.* 99. *Quod cum* is well on a special demurrer, where the writ is set forth in the declaration. 2 *Wils.* 203. i. e. in *C. R.* or by original in *B. R.*

In trespass, *nec non de eo quod*, &c. after a *quod cum*, is a positive charge. *Str.* 681. 2 *Ld. Ray.* 1413.

5. *The*

5. *The Declaration must be certain.*

The declaration must be certain, and therefore must shew the number, quantity, and quality, of the cattle or goods taken. *R. 5 Co. 34. b.*

But it is sufficient that the quantity, &c. is ascertained by a thing to which it refers: As, *wherefore he took a chest, and divers cloaths in the chest aforesaid*, is good, without saying what cloaths he took. *R. Al. 9.*

It must alledge the time of the trespass, before the declaration filed; and therefore, if the declaration is filed in *Trinity Term*, and the trespass alledged after the term, tho' before trial, it is bad. *1 Sid. 308.*

If it is alledged at any time after the declaration filed, it is bad upon demurrer.

If it is alledged after the declaration and before trial, it is bad after verdict, except where the jury find specially, that the defendant was guilty before the declaration filed. *R. 1. Sid. 308. Com. Rep. 12. Salk. 662.*

If it is alledged at a day after trial, it will be aided by verdict. *Com. Rep. 12. Salk. 662.* Or at an impossible day. *Vide Com. Rep. 13.*

If the plaintiff declares of a trespass committed within the term, wherein he declares, the declaration should be intitled of a particular day, or return, after the trespass.

If the declaration alleges that such a day defendant imprisoned him, and detained him 24 days, without saying, when, it shall be intended immediately after the imprisonment. *R. 2 Cro. 664.* If it alleges, and other wrongs to them did, instead of to him, it is not material. *R. Id.*

So, if it alleges the trespass in a close called *A.* abutting upon the lends of *B.* in *D.* the close shall be intended in *D.* *R. 2 Rol. 251. l. 45.*

6. *The Declaration must be conformable to the Original.*

The declaration must be conformable to the original; and therefore, if the declaration is wherefore the closes, when the original was, wherefore the close, it is bad. *R. Cro. El. 185.*

If the declaration is, wherefore the close, omitting *broke*, and the writ, wherefore he *broke* the close. *Per 2 J. Vent. cont. 2. Vent. 153. Sed qu. de hoc?*

But

But an immaterial variance, or what may be supplied by intendment, does not prejudice. *Id.* Nor a mistake of *summoned for attached.* 5 *Com. Dig.* 315.

7. *The Declaration must be vi et armis.*

It must be *with force and arms, and against the peace*, for the omission is substance. 5 *Com. Dig.* 315. cites contrary authorities. But now by the *stat. 16 & 17 Car. 2. c. 8.* it is aided after verdict. And by the *stat. 4 & 5 Ann. c. 16.* Upon a general demurrer.

8. *The Declaration must be contra pacem.*

The declaration must be against the peace of the now, or late king, according to the fact.

It must mention the cattle, or goods, to be of such a price or value. 2 *Lev.* 230. But it is sufficient, if it be in the writ, though omitted in the declaration. *R. 1 Sid.* 150. This is, where the writ appears upon the record, as in *C. B.* or by original in *B. R.*

This shall be aided after verdict, and upon a general demurrer, for it is only form. 2 *Cro.* 148.

9. *The Declaration must shew a Property, or Possession, in the Plaintiff.*

The plaintiff by his declaration must alledge that the property, or at least the possession of the lands, or goods, &c. is in him; and therefore, if in trespass *of the plaintiff*, or *his*, is not inserted, it is bad. *R. 1 Sid.* 184. And it will be bad after verdict. *R. Id.*

Though it is, *wherefore he broke the close of the plaintiff*, and five loads of hay, there took, omitting *his*, for it shall not be intended the plaintiff's hay, though it is in his close, without being alledged. *R. 2 Lev.* 156.

If this had not been determined, I think it would not now receive such a determination.

Trespass by Dean and Chapter, for entering the close of the dean, is not good. *R. Cro. El.* 200.

If, *of the plaintiff's*, or *his*, be recited in the original, it is sufficient though omitted in the declaration. *R. 1 Sid.* 187. *R. Lut.* 1509.

If the defendant by his plea, shews the goods to have been in possession of the plaintiff, this aids the declaration *R. 1 Sid. 185.*

If the declaration alledges, that he broke and entered a close, *in the use and occupation of the plaintiff*, it is well. *5 Com. Dig. 316.*

A declaration in trespass, may alledge it to be committed, *continuando* from such a day to such a day. *2 Rol. 545. l. 15.* And this in trespass, *quare clausum*, or *domum fregit*, as well as for spoiling his grass, or cutting his corn. Or for cutting down several acres of his wood. Or, for *mesne* profits, and carrying away 500 loads of corn. And the *continuando* may be for any trespass, though the act was not continued: As for trespass *with his feet in walking*, though it be the act of a man. Entering his close, and killing his conies. Entering and hunting. And the *continuando* may be alledged for several years, for ten, or twelve years, &c. It may be to a day after the term began, if it be before the bill filed.

But regularly, a *continuando* cannot be alledged in a trespass, which has not continuance: As, for a single act, as in trespass wherefore *he cut his tree, took his horse, &c.* *5 Com. Dig. 317.*

The *continuando* ought to be certain, and therefore *continuando piscation'*, without stating the quantity and quality of the fish, is bad. *R. after verdict by 3 J. Scroggs. cont. 1 Vent. 329. 2 Jon. 109.*

Continuando to a day after the commencement of the action, and entire damages, is bad after verdict. *D. 1 Vent. 104. R. 1 Vent 264.*

Continuance of the trespass *aforesaid*, generally is good. *1 Sid. 224. 5 Mod. 179.*

If the declaration is for one trespass, which may, and another, which cannot be with a *continuando*, the *continuando* of the trespass *aforesaid*, shall be restrained to the trespass only, which may; after verdict. *5 Com. Dig. 317.*

So continuance of the trespass, *quoq*, &c. which is expressed *minus certe*, shall be aided after verdict. *R. 1 Sid. 249.* So a *continuando* to a day impossible, or after trial. *5 Com. Dig. 317.*

The plaintiff may alledge the trespass with a *continuando*, or *that on divers days and times*, between such a day, and such a day, &c. *Salk. 639.*

So the plaintiff may alledge a matter for aggravation of the trespass, though an action is not maintainable for it by itself:

As,

As, entry into his house, and battery of his wife and children, &c. though trespass does not lie for this, by the husband or father, without special damage. *Salk.* 642.

Trespasses on different days may be laid in one count, for breaking, &c. on such a day, with a *continuando*; and if there are more counts, the court, on application will reduce them to one. *Barnes*, 360.

But such applications are seldom made, unless a declaration is enormously, and unnecessarily long.

10. *Pleas in Trespass.*

Not Guilty.

To trespass the defendant, may plead the general issue, *Not Guilty*. To trespass, *quare clausum fregit*, not guilty within six years. And to trespass for assault, &c. within four years, by virtue of the 21 *Jac.* 1. c. 16.

Though he was indicted and found guilty, or submitted to a fine for the same trespass. *Rol.* 863. l. 2.

And in trespass for battery of his servant, *per quod servitium amisit*, generally, *Not Guilty*, is a proper plea; for he cannot justify by *molliter manus*, &c. for this would not be a loss of service. 5 *Com. Dig.* 318.

But in battery, *not guilty within six years*, instead of four years, is bad. *R. Mod. Ca.* 40. *Salk.* 423.

On not guilty pleaded, a freehold may be given in evidence. *Andr.* 108.

11. *In Discharge.*

A Release.

The defendant may plead specially; and this in discharge, excuse, or justification

In discharge, he may plead a release by the plaintiff.

If the action be by executors for goods of the testator, a release by one of the executors.

So, if there are several defendants in trespass, a release by the plaintiff to one of the defendants.

Or in trespass against *B.* he may plead that the trespass was committed with *A.* and the plaintiff released to *A.* *absque hoc*, that it was done by him alone. 5 *Com. Dig.* 318.

If the release be upon a day before the trespasss alledged, he must traverse the trespasss after. *R. 4 Mod.* 182.

If a release is pleaded, he need not plead, *Not Guilty* to the *vi et armis*. 1 *Brownl.* 196.

If a release is pleaded, the defendant must traverse, that he was not guilty at any time after, and before bringing the action. *For.* 359.

A release, in pursuance of an award, cannot be pleaded, if defendant is not party thereto, but it may be given in evidence in mitigation of damages; and if the words are general, the plaintiff shall not shew, that the cause of action was not included. *Stra.* 646.

12. Accord, or Arbitrament.

The defendant may plead accord and satisfaction. Or arbitrament. So an accord or arbitrament, between the plaintiff and one defendant, if it is performed. So, satisfaction. 5 *Com. Dig.* 318.

Replication.

To accord pleaded, the plaintiff may reply *nul tiel accord*. Accord for another matter, with traverse of the acceptance in satisfaction of this trespasss.

That he is guilty after accord made.

To arbitrament, the plaintiff may reply, *nul tiel accord*. Or, that no arbitrament was ever made. That the arbitrators were discharged. 5 *Com. Dig.* 318. to the last point cites. *Cl. Aff.* 180.

But I conceive in this case, the discharge must be shewn to have been by *both* parties.

To trespasss with cattle, the defendant may plead, that the plaintiff distrained the cattle *damage-feasant*, and impounded them.

To this it is a good replication, that the cattle died in pound, before satisfaction. 5 *Com. Dig.* 318.

But *qu.* if the plaintiff should not shew, that the impounding was in a pound *overt*, where the plaintiff might have fed them?

It has been held not to be a good replication, that the cattle escaped without the plaintiff's consent. *Per 3 R.* 1 *Salk.* 348.

13. Reco-

13. *Recovery in another Action.*

The defendant may plead in bar, recovery, for the same trespass, in another action. *Vide Action. Div. IX. No. 1.*

14. *Pleas in Excuse or Justification.**To an Assault and Battery, Son Assault.*

In excuse, or justification, of an assault or battery, the defendant may plead *son assault demefne*, or an assault of her husband, where the battery is by the wife, and that she defended him. So, an assault by the plaintiff, on defendant's wife, son, father, master, or servant. *5 Com. Dig. 319.*

So the defendant may plead an assault upon him by the plaintiff, to take his dog, goods, &c. or to intrude into his house, &c. *2 Bro. Ent. 144.*

So he may plead *son assault*, in trespass, for wounding. Or in *mayhem*, though every assault is not sufficient to maintain it,

Replication,

To this plea the general replication is, *de injuria sua propria, &c.*

Or the plaintiff may reply, that he peaceably arrested the defendant, upon which he assaulted him, the plaintiff. So he may reply that the defendant would have assaulted the plaintiff's husband, father, son, &c. *5 Com. Dig. 319.*

If a servant justifies, for that plaintiff *having* assaulted his master, he, in defence of his master, struck the plaintiff, it is ill; it should be, that the plaintiff would have beat his master, if he had not interposed. *Stra. 953.*

15. *Molliter Manus Imposuit.*

The defendant may plead *that he gently laid his hands on the plaintiff*, to prevent mischief: as, if two contend, that he gently laid his hands on them, to separate them. *2 Bro. Ent. 143.* That he gently laid his hands upon the plaintiff (who, assaulted another) to keep the peace. *Id. 137, 8.*

Molliter manus imposuit, does not, as I conceive go to the justification of a wounding, or battery, unless the defendant can go farther in his plea, and shew that the plaintiff, after the

the *molliter manus imposuit*, made an assault on the defendant, and he defended himself, when it becomes a special *son assault demesne*. *Vide 5 Com. Dig.* 320.

The defendant may plead that the plaintiff set a dog upon such an one, and he gently laid his hands upon him to restrain him; *2 Rol.* 546. *l.* 40. That the defendant gently laid his hands upon the plaintiff, to restrain him from pulling down his stall in a fair. *Id.* 547. *l.* 15.

Or, from taking or destroying his goods, &c. *Id.* *l.* 10. From taking his dog, horse, &c. *Cl. Aff.* 92. *Bro. V. M.* 486. From taking cattle, &c. in his custody upon a distress. *2 Rol.* 549. *l.* 10. Or rescuing them. *2 Bro. Ent.* 260. From rescuing goods taken in execution, and he need not say by the bailiff's command. *R. 3 Lev.* 113. So to restrain him from diverting the defendant's water-course. *2 Rol.* 547. *l.* 10.

So the defendant may plead, that he gently laid his hands upon the plaintiff, to remove him out of his house or close. *Lut.* 1435. But he ought to shew a previous request to the plaintiff to depart. And I conceive it is sufficient for the defendant to say he was lawfully possessed of the house, &c. without shewing a title, though there are authorities to the contrary. *Vide Cro. Car.* 138.

The defendant may plead that he gently laid his hands on the plaintiff, that he might not go out of a tavern before he had paid his reckoning. *Cl. Aff.* 100.

To restrain him from disturbing a person at a funeral. *R. 1 Mod.* 168. That he gently laid his hands upon him to take him before a justice of peace for cheating at cards. *R. 2 Rol.* 546. *l.* 30. To arrest him upon a warrant of a justice of the peace. *2 Rol.* 546. *A.*

So, if an officer, or any one in his aid, arrests upon process of law.

If there was actual force, he may justify using actual force to remove, without a request to depart. *R. Salk.* 641. otherwise where only force in law. *Semb. Id. vide supra.*

But a man cannot plead that he threw stones *molliter* against a trespasser to remove him, &c. If he concludes *and so he gently made an assault*, for *laid his hands*, &c. it will be bad. *5 Com. Dig.* 320.

A defendant cannot justify a laying of hands, because the plaintiff would have struck his horse, &c. without saying, that he assaulted or beat. *R. Lut.* 1483. But if he was in the act of striking, I think this would amount to an assault, and

and that the defendant would be justified in the preventing him.

He cannot justify a *molliter manus*, to remove the plaintiff from the defendant's land, without saying he was upon it. *R. Lut.* 1497. And I apprehend he ought to shew that the plaintiff was *wrongfully* upon the land, for he might have a right to be there, as in the use of a way, &c. in which case, the defendant could not justify the removing, or even attempting to remove him.

The defendant cannot justify the removing him from off an horse, which he had borrowed for two days, because he went out of his way. *R. 1 Brownl.* 218. *2 Cro.* 236.

He cannot justify the battery of a servant, by which the plaintiff lost his service, by *molliter manus imposuit*. *Lut.* 1497. *Vide ante.* No. 11.

A battery cannot be justified by *molliter manus* on an arrest only, but defendant must shew resistance, or an attempt to rescue. *Stra.* 1049. *B. R. H.* 298.

But battery may be justified by *molliter manus*, &c. in other cases; as if plaintiff entered his house without his leave, and there disturbed him, and because he would not go out, therefore *molliter*, &c. *B. R. H.* 358.

Replication.

To *molliter manus imposuit*, the plaintiff may reply, that he did it *of his own wrong*. *Tho. Ent.* 422. And he ought to add *without any such cause as the defendant hath alledged*.

So to an outrageous battery the plaintiff may reply, *of his own wrong, without this, that he gently laid his hands*, &c. *Lut.* 1436. *Skin.* 387.

16. Plea, Defence of his possession.

The defendant may plead to an action for an assault and battery, that it was in defence of his house; for that is his castle. So in defence of his possession. In defence of his dog, cattle, &c. *5 Com. Dig.* 320. But *qu.* if it is not to be understood by *molliter manus imposuit*? *Vide Lut.* 1483.

A man cannot justify a *wounding* in defence of his possession. *R. 2 Rol.* 548. *l.* 35. Nor do I conceive he can justify a battery.

He cannot justify a battery for disturbance in the erection of a booth. *2 Rol.* 548. *l.* 40. Nor for being in a park

park in the night, if he does not resist or fly from the keeper, *Id.* l. 30. Nor in defence of his master's goods.. *Per Powel, Lut.* 1483.

17. *Plea of an amicable Contest.*

To an action for an assault and battery, the defendant may plead that he wrestled with the plaintiff for a wager, *5 Com. Dig.* 320.

18. *Plea of moderate Correction.*

To an action for an assault and battery, the defendant may plead that the plaintiff was a lunatic, &c. and he chastised him in order to bring him to sound mind. That the plaintiff was his scholar and he moderately corrected him, Or his servant, or his son, &c. *5 Com. Dig.* 320.

But it is no plea in trespass for a battery that the defendant was a lunatic. *2 Rol.* 547. l. 1. If he still continues a lunatic, will the law compel him to plead?

19. *Plea of inevitable Necessity.*

The defendant may plead, that he did it through inevitable necessity against his will: as, that at a muster, he (being soldier) discharged his musket, and the plaintiff suddenly crossed him, whereby he was inevitably struck, against his will. *5 Com. Dig.* 21. *Vide post.* No. 30.

But the plea is not good, if it does not appear to the court that it was inevitable, without the defendant's default or negligence: as, if he says the plaintiff casually had the gun discharged in his face. *5 Com. Dig.* 321. So that *A.* assaulted him, and in lifting up his stick for his defence, he casually struck the plaintiff. *Ray.* 423.

In trespass for an assault and battery, plea, that his horse upon a fright ran against the plaintiff, who, upon being called to, would not go out of the way, is bad; for it does not answer the battery. *R.* 4 *Mod.* 405. So, a plea, that he shot an arrow at butts, and wounded the plaintiff against his will. *21 H.* 7. 28. *a. Roy.* 423.

In trespass upon land, plea, that the defendant cut down his hedge, and the branches of the trees, *ipso invito*, fell upon the land of the plaintiff, is bad. *Ray.* 422. Or fell into the river, whereby the water-course to the plaintiff's mill

mill was stopped. *Id.* Or, that in building his house, timber, *ipso invito*, fell upon the house of the plaintiff. *Id.*

20. *Plea to an Assault, per quod Consortium &c. amisit.*

To trespass *per quod consortium, or servitium amisit*, the defendant may plead, *Not Guilty*. Or that the wife, or servant made the first assault; for if he justifies the battery, it will be an answer to the loss of service, &c. which is consequential. *Per 2 J. 1 Rol. 393. Tho. Ent. 390.*

21. *To False Imprisonment.*

By his own Authority, as an Officer, &c.

To trespass for false imprisonment, the defendant may plead, that he did it by virtue of his office: As, that he, being constable, saw the plaintiff break the peace, and therefore he put him in the stocks. *5 Com. Dig. 321. Sed. qu.* if he could justify the putting him in the stocks, unless he had not any other place of safe custody? He might have justified the taking him into custody, and carrying him before a magistrate to be dealt with according to law, and confining him a reasonable time previous thereto, but it does not seem to me, that he could justify inflicting an arbitrary, or indeed, any *punishment* upon the plaintiff. *Vide infra.*

That, being constable, he put the plaintiff in the stocks for making *hue and cry*, without cause. *Bro. V. M. 479.* For keeping an house of bad fame. *Id.* The two last cases seem liable to the objection, I have made above.

In *4 Com. Dig. 135.* If the peace be broke in the view of a constable in the night, &c. he may imprison the offenders in the stocks, or other custody for a reasonable time, until he can bring them before a justice. Or, until they find surety. For the last point he cites. *H. P. C. 136. per Poph. 13.*

So, it hath been adjudged, that he may detain in the stocks, him who leaves an infant of two months old in a church. *R. Mo. 284. Cro. El. 287. Poph. 12. Sed vide supra.*

But a constable (it hath been alledged,) cannot imprison, or put in the stocks, without bringing the person before a justice

justice of peace. *R. Sav.* 98. Nor for longer time than he can bring him before a justice. *H. P. C.* 92.

By the *stat.* 7 *Jac.* c. 5. A constable for any thing done by virtue of his office, may plead, *Not Guilty*.

There is a peculiarity respecting this statute. It was made *perpetual*, by the 21 *Jac.* c. 12. and yet by c. 28. of the same year, it is *continued* to the end of the next session. That continuance being a work of supererogation, or rather nugatory, and no act whatever, having repealed the former act, it remains in force.

The defendant may plead, that he, being governor of the plantations, committed the plaintiff, until he was brought to the court of *oyer and terminer*. *Ca. Parl.* 25.

The defendant may plead, that he imprisoned, to prevent apparent mischief, which might ensue: As, to restrain the plaintiff, *non sane*, from killing himself, or others, burning an house, or other mischief. 2 *Rol.* 559. l. 35. *Vide ante*, No. 19.

That the plaintiff and another were fighting, and he restrained him from fighting, until the rage was over. 2 *Rol.* 539. l. 40.

But the defendant cannot justify a restraint, (because they threatened to fight) to prevent it. *Id.* l. 45.

That the plaintiff was a cheat, and played with false dice, and the defendant took him to carry him before a justice of peace. *Jon.* 249.

That the plaintiff would have left a child in the parish, and he, (the defendant,) being constable of the parish, took him before a justice. 1 *Leo.* 327.

But, it is no plea, that he apprehended and detained him until he consented to remove a misdemeanor, nuisance, &c. *R. Id.* The defendant cannot justify by prescription to imprison for a day or two at discretion, if any one bears himself contemptuously towards the bailiffs of the corporation. *R.* 2 *Leo.* 34.

That he, being constable, took away salmon taken contrary to the *stat.* 1. *El.* c. 17. is not good, without the warrant of a justice of peace. *R.* 1 *Salk.* 407.

22. By Warrant of a Justice of Peace.

By *stat.* 7. *Jac.* c. 5. In an action against a justice of the peace, mayor, bailiff, constable, &c. for any thing done by virtue of their offices, or against any others in aid, or by command

command of such officers, the defendant may plead, *Not Guilty*, and give the special matter in evidence.

And therefore, if a man seizes a gun, &c. of a person not qualified, by a justice's warrant, he may plead, *Not Guilty*. *Lut.* 156.

If the defendant justifies, as judge, or officer, he must shew his authority. *Ca. Parl.* 29. And that the matter was within his conuance or jurisdiction. *Ibid.*

If the defendant justifies an arrest by command of a justice, or mayor, he must shew in certain for what cause it was. *R. 2 Cro.* 81.

If he justifies by command of a dean and chapter, he must shew a precept, or warrant. *R. Carth.* 74.

An officer who joins in a justification with a party who is not justifiable, shall fail. *Philips v. Biron, & al.* 1 *Stra.* 409.

When the party and officer join in a justification, which is ill, as to one, judgment shall be against both. *Smith v. Dr. Bouchier, & al.* 2 *Stra.* 993; 4. *Middleton v. Price.* 2 *Stra.* 1184.

By the *stat.* 24 *Geo.* 2. c. 44. § 6. Action is not to be brought against a constable acting under a warrant, unless he refuses a copy of it.

By the same statute, a month's notice is to be given of an intended action against a justice of peace; and he may tender amends, in bar of the action, or pay money into court. *Vide the stat.*

23. *Justification by Process.*

Vide ante Replevin. No. 23.

The defendant may plead, that what he did was by *mesne* or judicial process out of the king's court: As upon a *ca. sa.* after judgment in *B. R.* or *C. B.* Or, upon a *scire facias*, or *ca. sa.* after judgment in an inferior court. Or, upon *mesne* process out of *B. R.* or *C. B.* Or an attachment of privilege. 5 *Com. Dig.* 322.

Or, by *homine replegiando.* *Lut.* 1430. Attachment, &c. out of *chancery.* *Lev. Ent.* 191. Or, upon process from a county palatine. But I take it for granted, the caption must be within that county.

So he may justify upon process out of an inferior court of record. *Tho. Ent.* 342. Or, out of the court of *Admiralty.* 2 *Lev.*

2 *Lev.* 131. Or, if a county, or hundred court, &c. *Lev. Ent.* 212. *Lut.* 1440.

Or, by command of the *chief justice* to deliver him to the *marshal* according to custom. 2 *Rol.* 558. l. 35.

If the defendant justifies by a judicial process out of a superior court, it is sufficient to alledge the judgment, writ of *ca. sa.* and warrant thereon to the officer. And the officer himself need not alledge the judgment, only the writ and warrant. *R.* 3 *Lev.* 20. 1 *Salk.* 409. So, if by *mesne* process out of a superior court, it is sufficient to alledge the the writ to the sheriff and warrant upon it. *Vide ante*, No. 23.

It is sufficient to shew a writ to the sheriff, and a warrant to the defendant before the arrest, though there was not an actual delivery of the writ to the sheriff before the arrest, if the defendant had not notice of the non-delivery.

But, if the justification is by *mesne* or judicial process out of an inferior court, he must shew all the proceedings at large, regularly. 5 *Com. Dig.* 322. And therefore, if a good authority does not appear for holding the court, it is bad. *Id.* 323. If he shews an authority by patent and prescription, it is not good. *Id.*

So, if a plaint was alledged, upon which *such proceedings were had*, that judgment, &c. it was not sufficient antiently. *Lut.* 918. But now it is sufficient. 5 *Com. Dig.* 323. So, if it does not appear, that the cause of action arose within the jurisdiction of the inferior court, it is bad. And therefore it must be alledged, at what place it arose. *Id.*

And though the plaint there mentions it to be within the jurisdiction, it is not sufficient. *R.* 3. *Lev.* 243, 4. *cont. Lut.* 937. So, if it does not appear, that the plaint was levied, or the defendant impleaded there. 3 *Lev.* 404. Or, before whom the plaint was levied. *R. Lut.* 1526. Or, in what county the court was. *Id.* Or, out of what court the process issued. *Lut.* 1460. *R. Salk.* 517.

If he justifies trespass until he paid, 11l. 10s. by process of execution for 11l. only, it is bad. *R.* 2 *Mod.* 177. If he alleges a mandate by the court to *B.* to carry to the compters, *B.* must shew, that the party was detained *there*; for that he took and detained him generally, is not sufficient. *R.* 1 *Salk.* 408.

If he alleges an attachment out of an inferior court, this does not justify the carrying away goods. *Mod. Ca.* 71.

If the defendant justifies by process out of the *Admiralty*, which recites it to be in a maritime cause, the defendant need

need not aver, that the cause arose upon the high seas. *R. 2 Lev. 131.*

If he justifies by process of a court leet, he need not shew that it was held by grant, or prescription. *R. Salk. 200.*

If the defendant pleads a judgment in *B. R.* he must shew where *B. R.* then was, for that court is removeable. *R. Cro. El. 504.*

If the defendant justifies by a sheriff's warrant, he must shew his warrant specially. *R. 4 Mod. 378.* The defendant must shew that the warrant was directed to him, for to *D.* without saying the aforesaid *D.* is not sufficient. *Semb. Lut. 1465.* That he is an officer, to whom the warrant ought to be directed. *R. Lut. 1464.*

If the defendant alledges a sheriff's mandate to a bailiff of franchise, he must say it was sealed. *2 Vent. 193.*

If the sheriff or officer himself, to whom process is directed, justifies imprisonment by force of such process, he must shew the writ to be returned. *5 Com. Dig. 323.*

So, if he justifies by *fieri facias*, *pluries replevin*, or other process returnable. *R. 1 Salk. 410.* But the bailiff of a franchise needs not. *2 Rol. 563. l. 25.* Nor a bailiff who hath a warrant from a sheriff, or the party, or any other, who acts in aid of him. *5 Com. Dig. 323.*

So the sheriff or principal officer, need not in *replevin* or *alias*; for they are not returnable. *R. 1 Salk. 210.* Nor where he pleads that the defendant was rescued, whereby he could not make a return. *5 Com. Dig. 323.*

But an officer cannot justify taking upon an *habeas corpus*, after a *cepi* returned, where the party is let to bail; but he ought to aid himself upon the bail. *R. 2 Rol. 558. l. 25.*

So he cannot justify by an order of *chancery*, but it must be by attachment. *R. 1 Mod. 272.*

If a warrant on a *capias* hath two bailiffs names inserted by the under-sheriff, and a blank left for a third, is sealed, and sent to plaintiff's attorney, who inserts another bailiff's name in the blank, it is a bad warrant, and no justification of the third bailiff who arrests. *2 Wilf. 47.*

If the defendant justifies under a *capias* out of a base court, in action of debt, and shews that a plaint was levied, and such proceedings were had, that a *capias* issued; it is well, without shewing that a summons issued before the *capias*. *Id. 5.*

If the plaintiff in an action in an inferior court, and the officer jointly justify under a process returnable at the next court,

court, they must shew a return made; or the officer is a trespasser *ab initio*, and the plaintiff by joining in the plea is equally affected. *Stra.* 1184. 1 *Wif.* 17.

In trespass for taking goods, if the defendant justifies for that *according to the custom* of a city, he levied a plaint, &c. it is good, though he does not say the court was held according to custom, and although he does not aver that they were taken within the jurisdiction, (if it appears they were,) though he mentions only one sheriff of *London*. *B. R. H.* 298.

In case against an officer for false imprisonment on 12 *Geo. c.* 29. if he pleads process of an inferior court, it is a sufficient excuse for him. *Fort.* 344. *Vide tab. to Statutes tit. Arrest. No. 9.*

If defendant pleads an outlawry and warrant, he must aver that the *cap. utlagat.* was filed and remained of record, and he must say *prout patet per record.* *R. on Demurrer in C. B. and affirmed on Error in B. R.* *Id.* 379.

A ca. sa. on a judgment afterwards set aside for irregularity, is no justification to the plaintiff; but, on an erroneous judgment it is. *Stra.* 509.

24. Plea to Trespass for taking cattle, or goods.

Distress for Rent, &c.

To trespass for taking cattle, or goods, the defendant may plead that he took them as a distress for rent, services, &c. Or, for a rent-charge. Or, for rent reserved upon a lease for life, or years. Or, for relief, amerciamment, &c. *Vide ante Pleadings in Replevin.*

So for toll. *Lut.* 1520. For toll, or stallage, in a fair, or market. *Id.* 1499, 1517.

So he may justify as an officer by the *stat.* 1 *Jac. c.* 22. for searching and seizing leather not tanned. *Lut.* 181. 1403.

So as a game-keeper, for seizing the gun, &c. of a person not qualified. *Lut.* 1505.

For seizing an heriot, &c. due by custom. *Id.* 1310. *Win. Ent.* 62.

Where the land is copy-hold; or due by tenure, or reserved by a demise. 5 *Com. Dig.* 324.

If the defendant justifies as a bailiff or servant to another, when he is not so, the plaintiff may reply *de son tort*, &c. *Cro. El.* 14.

25. *Plea Damage feasant.*

The defendant may plead that the place where, &c. was his freehold, and he took the cattle, &c. *damage feasant*. That it was the freehold of *B.* and he took as his servant, the cattle, &c. *damage feasant*. That *B.* was seised, and demised to him for years, who took *damage feasant*. *Lev. Ent.* 209.

So I conceive it is sufficient for the defendant to say, that he was *possessed of* such a close, &c. without shewing a title, and that he took the cattle, &c. *damage feasant*, though there are some cases *cont.* which by other cases are denied to be law. *Possession* must certainly be sufficient to, justify taking for *damage feasant*, as well as for maintaining an action of trespass. *Vide*, as to cases, *pro et cont.* 5 *Com. Dig.* 324.

The defendant may plead that the plaintiff used nets to fish in his several fishery, for which he took them *damage feasant*. *Cro. Car.* 228.

But the defendant cannot justify destroying the goods, &c. found *damage feasant*. Nor the cutting nets or oars to prevent fishing in his fishery. *R. Id.*

Nor cutting the wood of a seat erected in a church without licence, &c. though removed by the *church-wardens*. *R. Noy.* 108.

But I apprehend a necessary and unavoidable cutting, to remove, may be justified.

In trespass for breaking and entering an house, and taking away goods, and *converting* them to his own use; if defendant pleads, that he took them *damage feasant*, and removed them to the pound, and left them for the plaintiff's use, it is bad; for it is no answer to the converting them to his own use. *Fort.* 381. As to the conversion he should plead not guilty: yet *qu*, if the conversion is a trespass?

In trespass for impounding cattle, and *keeping them so close that one died*, not guilty, and justification *damage feasant*; verdict for plaintiff on the first plea; for defendant on the second; there shall be judgment for defendant; for the justification covers the whole; the death of the beast being only *gravamen*, and need not be answered. The plaintiff might have had *case* for the death. 2 *Wilf.* 313.

The plaintiff to a taking *damage feasant*, may say that the taking was in another place. *R. 2 Cro.* 141.

So

So he may say that the defendant of his own wrong, and without any such cause, &c. took, &c.

26. For Prevention of Damage.

The defendant may plead that he took to avoid damage otherwise inevitable: as, that he took out of the house to preserve from fire. *Semb.* 21 H. 7. 27. *b.* That he chased cattle *damage feasant* with a dog. 5 Com. Dig. 324. But it must be a moderate chasing.

That he removed iron, &c. which the plaintiff had broken down his (the defendant's) fences with, and left upon his land, to the land of the plaintiff, and had given him notice thereof; for he need not take it *damage feasant* and impound it. R. 2 Rol. 566. l. 35.

In such a case as this, I do not apprehend any notice was necessary.

But it is no plea, that he took for the safety of his goods, where the owner may have remedy if they are destroyed: as, that he took corn severed for tithes, and carried them to the barn of the plaintiff, the parson, to save them from the cattle going in the same close. R. 1 H. 7. 27. *b.* That he took the plaintiff's horse going in the field for fear it should be stolen. *Id.* These are very antient cases, and I think now, on *not guilty*, and the facts proved, a plaintiff would at least have his own costs to pay, supposing no real injury done by the defendant.

27. Default of the Plaintiff himself.

The defendant may justify for the plaintiff's own default: as, if the plaintiff puts his grain or money with those of the defendant, he may justify taking the whole. 5 Com. Dig. 325. Or, if the plaintiff takes a handful of grain from the defendant's, and mixes with his own, the defendant may take an handful of the plaintiff's. 2 Rol. 566. l. 12.

So, if before execution against *A.* he puts the goods of *B.* with his consent among his (*A.*'s) by *covin*, that an action may be brought by *B.* for the taking, the bailiff may plead the fraud in excuse. *Per Lee, Ch.* 2 Rol. Rep. 393.

28. Defect of Fences.

The defendant may plead that the plaintiff by prescription ought to repair the fences between the closes of the plaintiff and

and defendant, and for want of repair, his cattle escaped, and did the damage alledged. That the plaintiff ought to repair the fences between his close, and the highway, and for want thereof his cattle escaped out of the highway. Or, between his close, and the place where the defendant hath common.

That the plaintiff, or a stranger by his command, threw down the fences, whereby the cattle escaped. 5 *Com. Dig.* 325.

And it is sufficient for the defendant to say, that he was possessed of a close, adjoining to the plaintiff's close, without saying by what title, or for what term. *R. Yel.* 74.

It is a good plea, that all occupiers ought to repair. *Semb.* 1 *Salk.* 357. 1 *Vent.* 97. *Ray.* 192.

But it is not sufficient to say that the plaintiff ought to repair, without shewing by what title, to wit, by prescription, or otherwise. *R. Yel.* 75. That by agreement the plaintiff ought to repair; for he may have remedy upon his covenant. *Per* 3 *J. Cro. El.* 709. *Sed. qu. de hoc?*

The defendant may justify entering, to recharge cattle that escaped for want of fences. 2 *Rol.* 565. l. 35, 40.

It is no plea, if he suffers his cattle to continue there after notice, tho' the fences are not in repair. *Semb.* 2 *Leo.* 93. Or, if his cattle escape out of the highway into the plaintiff's land, because there is no fence; if he is not bound to maintain it. 2 *Rol.* 565. l. 47.

The defendant cannot alledge a custom to repair, but must prescribe that such an one ought. 1 *Vent.* 97.

It is no plea, that a forester, &c. entered to recharge deer, &c. that escaped by the plaintiff's neglect in maintaining the fence, &c. for when they are out of the forest, park, &c. the property is gone. *R. Kelw.* 30. *Manw.* 106.

Replication.

To this plea the plaintiff may reply *de son tort*, and traverse the prescription. *Rast.* 621. b. Or, *de son tort*, and traverse the want of repair. *Win.* 999. (or 1113. Edit. 1680.) or *de son tort*, and traverse the escape *mado de forma*. *R. Lut.* 1358, 9.

Or, *de son tort demesne* generally. *Rast.* 621. a. But then he should add the general traverse, and without any such cause, &c.

The plaintiff may reply that the fences were sufficient, but the defendant's cattle were unruly, and threw them down, &c. *Vide Raft. Id.*

29. *Necessity.*

The defendant may justify for unavoidable necessity: As, that he threw goods (being in a common barge upon the Thames, &c.) into the water in a tempest, to save the passengers lives. *R. 2 Rol. 567. l. 5. R. 12. Co. 63.*

That he pulled down the house to extinguish a fire. *12 Co. 63. Vide ante, No. 20.*

30. *Involuntary Accident.*

The defendant may plead, that it was not in his power to prevent it: As, that the cattle being in the road by the plaintiff's close, here and there snatched, and against his will depastured, the plaintiff's grass or corn. *2 Rol. 566. l. ult.*

That he chased sheep mixed with his own, to a place where he might separate them. *Per Rede, 21 H. 7. 28. a.*

An executor may plead that he took goods, mixt with the testator's goods, till he had knowledge of the mistake. *21 H. 7. 28. a.*

But if a man draws his bow, shoots his arrow, and without intent wounds a man, trespass lies. *Id.*

The defendant may plead, that his dog chased the plaintiff's sheep out of his (the defendant's) land, and pursued them against his will, into the plaintiff's land. *R. Lat. 13, 119.*

That an horse, being unruly, violently carried the plough into the plaintiff's land adjoining. *Lat. 13.*

That trees were blown down by the wind into the plaintiff's land, and he entered to remove them. *Id.*

That driving sheep in the highway, they, against his will, escaped into the plaintiff's land. *Id.*

That fruit fell from his trees into another's land adjoining, and he picked it up. *Lat. 120.*

But it is no plea, if the accident was by a voluntary act, or neglect of the defendant: As, if a man lets a falcon go at a pheasant in his own land, and pursues it into the land of another, trespass lies. *Lat. 13.*

If he cuts down a tree, which falls into the land of another, and he enters to remove it. *Id.*

31. *To Trespass pro Bonis cum Uxore abductis.*

To trespass for taking goods with the plaintiff's wife, the defendant may plead that she was his wife. 2 *Rol.* 551. l. 10. That he took her by leave of her husband. *R.* 1 *Ed.* 4. l. a.

But the defendant cannot plead *ne unques accouple.* 2 *Rol.* 551. l. 5.

32. *To Trespass for Killing a Dog, &c.*

To trespass for killing the plaintiff's dog, the defendant may plead, that the dog chased the conies in his warren, &c. *Agreed.* 1 *Sid.* 336. cont. 2 *Rol.* 567. l. 35. Or that he killed the deer in his park. 3 *Lev.* 28, 35.

And he need not say, that the plaintiff knew of the quality of the dog, to haunt the warren, &c. 2 *Cro.* 45. Or that there was a necessity to kill him. 1 *Sid.* 336. 3 *Lev.* 28.

The defendant may plead, that the plaintiff's mastiff came into the defendant's court, to the terror of his family, and therefore, he killed it. *R.* *Lut.* 1494. Or fastened upon his dog, and he could not otherwise part them. *Adm.* 1 *Saund.* 84.

But, if the defendant pleads, that the plaintiff's dog fastened upon the defendant's dog, for which he killed it, he must shew that he could not otherwise part them. *R.* 1 *Sid.* 336. 1 *Saund.* 84. So, it is no plea, that the dog chased an hare into his land, and therefore he killed, or took it. *R.* 2 *Cro.* 463.

So, if the plaintiff replies, that he chased conies, deer, &c. in his own land, and the dog pursued into the park, &c. he must say, he endeavoured to restrain him from going into the park, &c. *R.* 3 *Lev.* 28.

So, if trespass be for taking a dog with a collar, it is no bar to say, he was coursing an hare in the soil, and he took him, and led him away. *R.* 2. *Cro.* 463.

33. *To Trespass, quare Clausum fregit.**The Common Bar.*

To trespass *quare clausum, aut domum fregit*, &c. the defendant may plead the common bar, viz. that the close or house in the declaration mentioned, were the defendant's own freehold. *Win. Ent.* 961. (or 1077. Edit. 1680.) 14 *H. 8.* 24. *b.*

If the defendant pleads the common bar, he must name the lands which are his freehold, otherwise, if the plaintiff hath lands in the same place, as well as the defendant, the trespass cannot be proved in the defendant's land, for it shall be intended in the plaintiff's land, and he shall not be put to a new assignment, until the defendant ascertains another place by name. *R. Dy.* 23. *b.*

Yet, if trespass, is *quare causum fregit* in *D.* &c. plea *liberum tenementum*, and issue thereon, it is sufficient for the defendant to prove that he hath a freehold in *D.* *Salk.* 453.

If it is *quare clausum vocat A.* in *D.* he must prove title in a close of the name. *R. Id.*

If upon the common bar, there is a new assignment, where it is not necessary, it will be good by the statute of *Jeofail* after verdict. *R. 1 Brownl.* 200. So, a new assignment may be made, though the defendant justifies in the former place. *R. Salk.* 453.

To freehold pleaded, the plaintiff may say, that before the defendant had any thing in the place, *A.* being seised, leased to him. *Jon.* 352.

But, if to a common bar, the plaintiff replies, that the place is such, the defendant cannot rejoin that it is the same place as in the bar; for the replication says, *alias*, than in the bar, and therefore, the plaintiff will be estopped to give evidence of a trespass there. *R. Cro. El.* 492.

If trespass be for goods taken in *D.* the defendant cannot plead the common bar, for *D.* is named only for a *venue*. *R. upon a general demurrer.* *Salk.* 453. *Mod.* 117. *Carth.* 176.

If the defendant agrees in the name of the place, and varies in quantity, or other description, the plaintiff cannot assign a different quantity to the place where, &c. but must say,

say, there are two places of such name, &c. and that the trespass was in this. *R. Vel. 166. Cro. El. 897.*

If the defendant names a place, which contains the land in the declaration, and more, the plaintiff shall say, that the trespass was in such a land, without answering to the other quantity. *R. 27 H. 8. 22.*

If the declaration is in a market in *B.* if the defendant justifies in *B.* it is sufficient, though he does not answer to the market; for if the place makes the justification bad, the plaintiff must shew it. *R. 2 Jon. 207.*

If the common bar is pleaded, the plaintiff may reply, that it is his freehold, and join issue upon it. *Ast. Ent. 504. for per 2 J. Hought. cont. 2 Cro. 594.* He cannot traverse that it is the defendant's freehold. So by *Levinz. Lut. 1401. 1419. 27 H. 8. 22. b.*

Or may make a new assignment of the place, where the trespass was done. *2 Cro. 594.*

If the writ is general, and the declaration for *unâ rodâ terræ*, by a new assignment he must say an acre. *Win. Rep. 65.* For the new assignment is, as a new declaration; and to which defendant may, by leave of the court, plead several pleas.

If the declaration is *quare clausum fregit*, a new assignment in a barn, &c. is bad. *Leo. 16.* But *quare domum fregit* is sufficient for a barn, &c. *2 Leo. 185. + Leo. 16.*

The new assignment must ascertain the place, and therefore two acres of land, or meadow, is bad. So, if it does not give a name to the place, or the abuttals, it is bad. And if it gives the abuttals, they must be proved. *5 Com. Dig. 328.*

To a new assignment the defendant at the common law, might plead, *Not guilty*, or *justify*. *14 H. 8. 4. a.* And now by leave of the court, by virtue of the *stat. 4 Ann. c. 16.* He may plead, *Not Guilty*, and as many justifications as he thinks proper.

The defendant may, (upon a new assignment) justify for another cause than in his barn. *R. Mo. 540.*

To the new assignment, the defendant must plead, *Not Guilty*, or *justify*, for he cannot say, that the place assigned, and the place in bar, are the same. *R. Dy. 161. b. in marg. R. Mod. 463.*

34. *Licence.*

To *clausum fregit*, the defendant may plead, entry by the plaintiff's licence. *Win. Ent.* 1099. And licence at a day before is sufficient, without saying it continued; for it shall be intended, if the contrary does not appear. *Semb. Cart.* 218.

He may plead licence by the bailiff of the owner, and it will be aided after verdict. *R. 2 Cro.* 377.

So an implied licence; as, entry, *ad auxilium in puerperio ferend'*. *5 Com. Dig.* 328.

Continuance after the death of a lessee for life for six days, before which time he could not remove. *R. 2 Cro.* 204.

So, if *A.* licenses to *B.* to put trees, &c. in his garden, and afterwards sells the garden to *D.* who continues them there without seizure. *Mod. Ca.* 171. *Vide Infra.*

Or licence by law; as, that the house was a common tavern. *Win. Ent.* 1087, 1088, 1097. But it must be a peaceable entry, and for the purpose of making use of it as such.

That he entered to shew the sheriff cattle upon a replevin. *2 Rol.* 553. *l.* 12. *Vide post. No.* 39. To view waste.

But entry by licence of the plaintiff's wife, or servant, is not sufficient. *R. Cro. El.* 876.

Nor entry to take his goods or his falcon that pursued a pheasant there. *R. 2 Rol.* 567. *l.* 30. *Vide Post. No.* 39. Nor entry to visit his sick daughter, being servant to the plaintiff. *R. Id.* *l.* 20.

Or to demand his debt if he does not say that the owner was then there. *R. Cro. El.* 876.

So the licence will be determined by the sale of the land wherein it was given. *Per Holt. Mod. Ca.* 171. *Sed vide supra.*

It is said, *per Rede*, 21 *H.* 7. 28. *a.* That licence by the plaintiff may be given in evidence upon *Not Guilty*.

35. *Tender of Amends.*

To an *involuntary* trespass, the defendant may plead a tender of sufficient amends. *1 Bro. Ent.* 332. *Tbo. Ent.* 204.

By the *stat.* 21 *Jac. c.* 16. To trespass *quare clausum fregit*, the defendant, disclaiming title to the land, and shewing it to be an involuntary trespass, may plead tender at any time before the action brought.

So

So to a negligent trespass by escape of cattle, &c. 2 *Roll.* 570. l. 20.

But tender after action brought is too late. So after a *latitat* sued out; for the plaintiff may by his replication aver that he sued out a *latitat*, with intent to declare in trespass. *R. Cro. Car.* 264. 1 *Roll.* 538. l. 3.

So to avowry for *damage feasant* in replevin, tender must be pleaded before impounding, for it is not within the *stat.* 21 *Jac. c.* 16. which goes only to trespass. *R. Lut.* 1596.

Tender must be of a sum certain; for the defendant is a wrong-doer. *Salk.* 686.

To a *voluntary* trespass, tender before action brought is no plea; as, for putting cattle in the plaintiff's close. Or for breaking his hedges, &c. 5 *Com. Dig.* 329.

To trespass by mistake, tender before action is no plea; for, if the act was voluntary, it cannot be known whether it was by mistake, or how intended: As, that he cut down the plaintiff's grass by mistake for his own. *R. 3 Lev.* 37.

In trespass for taking away goods, the defendant pleaded tender of amends, and on demurrer, judgment was given for the plaintiff, the 21 *Jac. i. c.* 16. giving such plea only in the case of an involuntary trespass, with a disclaimer, and so is. 2 *Roll. Abr.* 570.

Replication.

To tender of amends, the plaintiff, may reply, That he did not tender. *Tho. Ent.* 304. Or, that the amends were not sufficient.

36. Public Good.

The defendant may justify a private trespass for the public good: As, entering the plaintiff's close, to make a bulwark in defence of the king and kingdom. 21 *H. 7.* 27. b. Pulling down an house to save others from fire. *Id.* & 2 *Roll.* 566. l. 2. To remove a nuisance. *Salk.* 458.

So an entry upon fresh suit of a felon, or goods stolen. Or to make a distress. 5 *Com. Dig.* 329.

But he cannot justify entering a close, or digging up the soil, to hunt or take a fox, badger, &c. though it be for the public good. Nor entry to take his goods, which a trespasser

passer carried to *B*'s house. Or to search for goods stolen, in another's land. *Ibid.*

37. *Prevention of Damage to himself.*

The defendant may justify for removal of a trespass from himself, though damage thereby happens to another: As, if *A.* erects a dam, wall, &c. upon his soil, and the soil of *B.* if *B.* throws down the wall upon his soil, it will be well, though thereby the whole wall, &c. upon the soil of *A.* also falls. *R. Cro. El.* 269.

But I must here observe, he will scarcely be able to justify it, if he saw the wall began, and permitted it to be completed, without objection; for I conceive that amounts to a licence, and he ought not afterwards to attempt to meddle with the wall.

The defendant may enter the land of another, to remove a nuisance there to himself. *Rol.* 565. *l.* 50.

He may break an house where he is wrongfully imprisoned, to make his escape. *Id.* 566. *l.* 5. He may chase cattle damage feasant with a dog to remove them. *Ray.* 423.

38. *Using or securing his Property.*

The defendant may justify an act for the security of his estate, or interest: As, if he has a fishery in another's soil, he may justify putting pales, or other things there. 2 *Rol.* 564. *l.* 27. If *A.* takes *B.*'s goods, *B.* may justify the taking them again, tho' there is an alteration in the form: As, if timber taken is cut into boards. *R. Mo.* 19. If cloth is made into cloaths. *Mo.* 20.

This was a subject of curious speculation and of subtle disquisition, attended with great niceties, in the *Roman* law.

If a man has goods, timber, &c. in an house or upon the land of another, his executor may justify the taking. 2 *Rol.* 564. *l.* 25.

If a trespasser puts the goods upon his own land, the owner may enter to take them. 2 *Rol.* 565. *l.* ult. 2 *Rol.* 56.

Otherwise, if a tenant in common takes all the goods which he has in common, and puts them on his separate land, the other cannot enter his separate land to retake them,

them, tho' he may retake his part, where he can do it without a trespass. *R. 2 Rol. 566. l. 30.*

The vendee of goods, timber, &c. may justify an entry to take them. *Id. 567. l. 40.*

The owner of a water-pipe by grant, or prescription, &c. may justify entering into the land, where it lies, to repair it. *Id. l. 45, 50.*

A forester may justify entering into land, next the forest, by prescription to re-chace deer to the forest. *R. 13 H. 7. 16.*

If goods are stolen and left in *B's* house, the owner may enter to take them. *2 Rol. 55. l. 6.*

A sheriff or his officer may enter where the door is open, to levy execution upon the goods there. *R. Cro. El. 759.*

A. may justify entering the house of *B.* then there, to demand his debt of him. *5 Com. Dig. 330.*

But if *A's* goods are in *B's* house or land, without his own act, *A.* cannot justify entering to take them, without *B's* licence. *Id.* Though he has licence from *B's* wife in his absence. *Id.*

This is the law, but I have great pleasure in saying, that in such cases, a plaintiff would not meet with any encouragement. He would at all events have his own costs to pay.

If the defendant hath a right to dig and take clay, &c. as tenant, he cannot take that dug by another, though no tenant. *R. Cro. El. 434.*

A man cannot take his goods, where they are substantially altered, as if timber is used to build an house. *Mo 20. Vide supra.*

I conceive notwithstanding the abhorrence our ancestors had to the civil law, that this doctrine, as well as many others, was taken from that most excellent code.

I *must* be guilty of a digression, but I trust the reader will excuse me. It was certainly a maxim of the civil law, under the Emperors, that *the will of the sovereign, was the law of the land*; and I believe that was the principal reason why our hardy ancestors, objected so strenuously, to the introduction of the civil law, into this country. The constitution of *England* hath been since understood, and defined. I may boldly assert, without fear of contradiction from the learned, that this is a fundamental maxim, not only in all other nations, but in this also. The question is, who is here the sovereign, or where does the sovereign power of the state reside?

reside? I answer, not in the king. Not in the *person* whom we address, upon every occasion as our *sovereign*. The king, as such, is the executive magistrate of the state. The *sovereign* power, *i. e.* that of enacting laws, to bind the state, is vested in, *the king, lords, and commons, in parliament assembled; i. e.* when they meet in their *legislative* capacity, to repeal, or amend, old laws, or to make new ones: then the king is one of the three estates of the realm, possessed of a power to assent to, or dissent from, the repeal, or alteration of old laws, and the passing of new ones.

But the king, of his own will merely, cannot alter or repeal any existing law. He cannot dispense with the execution of, or obedience to any law in force. He cannot make any new law. *Ergo*, in this respect, our ancestors were much mistaken.

I have taken up this subject, upon a supposition, that the maxim of the civil law, was according to many writers, the reason why our ancestors so strenuously resisted the introduction of that law. But I conceive there was a much stronger reason, why our ancestors objected to it, (tho' we have borrowed much from that code); which was, that if the civil law had been introduced in its full extent, the people of this country would have lost the *inestimable* trial by jury, and, consequently the *viva voce* examination of witnesses: the best adapted for the discovery of truth that ever was known.

Was I to descant at large upon the infinite superiority of a *viva voce* examination of witnesses, in an open court of justice, in the presence of many spectators, and where questions are unlimited, and the countenance, actions, and gestures of witnesses, exposed to public view, to a cold, methodical, and insipid examination of witnesses, in a private room, with but few present, upon written interrogatories, previously prepared, I might write a volume.

It is, in intricate cases, morally impossible to prepare interrogatories in chief, and for a cross-examination, to answer the purpose. Nothing can be a stronger proof than the very great number of questions, as to matters of *fact*, which the courts of equity have sent to the courts of law, to be ascertained by a jury, before whose tribunal only, a *viva voce* examination of witnesses can be had. I think this digression is a tribute I owe to the laws of my country.

39. *Title with Colour, to the Plaintiff.**When Colour shall be given.*

The defendant may plead title in himself by descent, fine, or feoffment, devise, &c. and give colour to the plaintiff. Colour is a feigned title given by the defendant to the plaintiff in assize, trespass, &c. when the defendant would refer his title to the court without sending to to *lay gens* *; for without such colour his plea will amount to the general issue. And colour must be always given, when the defendant's plea goes only to the possession; for, notwithstanding a right may remain in the plaintiff: As, if the defendant pleads a descent. So, if the defendant pleads that *A.* was seised in fee, or of the freehold, and he as servant and by his command entered; for the plaintiff may have a right by lease for years or otherwise. 5 *Com. Dig.* 330.

If the defendant pleads that the goods were waived in his manor, or sold in market *overt*, being stolen by *some person unknown*, he shall give colour; for *that unknown* perhaps was the plaintiff. 10 *Co.* 90. *b.*

But when the defendant's plea, bars the plaintiff's right and property, no colour is necessary: As, if the defendant pleads a collateral warranty, and relies upon it. *Id. a.* Or an estoppel, or fine with proclamations. *Id.* Or an act of parliament; for in these cases the plaintiff will be barred, tho' he had a right before. *Id. b.* So, if the plea bars the plaintiff and his blood for ever. *Id.*

So, if the plea goes to the plaintiff's right or property: As, if the defendant pleads that *A.* was possessed of goods, and sold them in market *overt*, there needs no colour; for the plea avoids the plaintiff's property. *Id.*

Or, that *A.* was possessed, and *B.* stole and waived them in his manor. *Id.* That the goods were wreck. *Id.*

That they were tithes severed from the nine parts, for this takes away the property of every other. *R. Id.* 91. *a.*

So, that *A.* enfeoffed *B.* and he as his servant entered; for when he shews how *A.* who had the fee or freehold, was intitled, the right shall not be intended in the plaintiff. *Id. a.*

If the plea is to the writ, or action of the writ, colour is not necessary. *Id.* 91. *a.* So, where the defendant admits that plaintiff had an estate, which is now defeated by condition, entry, &c. 5 *Com. Dig.* 331.

In trespass, if plaintiff declares on his possession, and defendant makes title, and gives colour, and plaintiff replies *de injuria*, &c. and traverses defendant's title, it is sufficient: for he need not reply a title, possession being enough against a wrong doer. *Stra.* 1238.

40. *What colour shall be good.*

Every colour must be matter of law which does not lie in the knowledge of *lay gens*: As, a claim by colour of a charter of feoffment by which nothing passed, &c. 10 *Co.* 91. *b.* 2 *Cro.* 122.

By a grant of a reversion to which there was no attornment. 2 *Cro.* 122. So it must be a matter which would be a good title if it was real. 10 *Co.* 91. *b.*

But default of colour is *form* only, and aided upon general demurrer. 10 *Co.* 95. *a.* *R.* 2 *Cro.* 229.

I shall say no more about colour than to say, it being only a matter of form, it is now seldom introduced into the plea, and that no gentleman at the bar, would demur specially for want of colour.

41. *Other Justification.*

The defendant may justify trespass *quare clausum fregit* by entry to execute process. Or, to make a distress. To make use of his way. *Lut.* 1427. In the highway. *Win.* 1004. To use his common. To make perambulation. *Co. Ent.* 651. *b.* To take his corn, cattle, &c. To repair his house, water-course, &c. To remove a nuisance.

To fish in his several or free fishery. *Hard.* 407. So the defendant may justify, by the command of another defendant who pleads *not guilty*; for his plea shall not take away from his servant his justification. *R.* 2 *Mod.* 67.

To trespass *quare clausum fregit* by *B.* the defendant may plead in bar a recovery by himself in ejectment against the plaintiff. *R.* 1 *Leo.* 313. 3 *Leo.* 194. Or a recovery or bar in another action for the same trespass. *Vide Action, Div. IX. No. 1. &c.*

If the defendant justifies by title to a manor, house, &c. it is not sufficient to say, *whereof the place in which, &c. is parcel*, without saying, *it was at the time of the supposed trespass.*

If

If the *locus in quo*, in trespass *quare clausum fregit*, &c. is the inheritance of the crown, (as *Windsor* great park), defendant, on not guilty pleaded, cannot give in evidence, that it was a common highway. *Duchess of Marlborough v. Grey*, M. 1728. *Bunb.* 259. Nor do I conceive in any case where the inheritance is in a private person.

I had some thoughts of giving the proceedings in *waste*; but as the action is, now, seldom used, an action on the case in nature of an action of waste being substituted in its place, I shall proceed to some more common, and consequently more useful titles. As to *Waste*, *Vide 5 Com. Dig.* 342.

W A L E S.

I. *Wales.*

1. *Part of the Dominion of England.*

According to Lord *Coke*, *Wales* was always feudatory to the kingdom of *England*. 2 *Inst.* 195. 4 *Inst.* 239. But I conceive his lordship was a better lawyer than historian, as, if I am not much mistaken, it was originally a free and independent state, before *England* was wholly under one sovereign.

It is said *per Coke*, to be held of the crown of *England*, but not parcel. *V.* 1 *Rel.* 246, 7. 2 *Rel.* 29. And therefore, it is said, the kings of *Wales* did homage, and swore fealty to *H.* 2. and King *John*. *Brad. Hist.* 299, 330, 480. So to *H.* 3. *Brad.* 663.

And 11 *Ed.* 1. upon the conquest of *Ellewellin* Prince or King of *Wales*, that principality became a part of the dominion of the realm of *England*. 2 *Inst.* 195. 4 *Inst.* 239.

And by the *stat. Wallie* 12 *Ed.* 1. It was annexed and united to the crown of *England*, *tanquam partem corporis ejusdem* *. 4 *Inst.* 240. 1 *Vau.* 300, 400. 2 *Rel.* 29. 2 *Mod. Ca.* 140. And by the *stat.* 27 *H.* 8. c. 26. reciting that it was always incorporated and united, it is enacted, that the dominion of *Wales* shall continue for ever incorporated, united, and annexed to the realm of *England*.

Yet, if the *stat.* of *Wallie*, made at *Rutland* 12 *Ed.* 1. was not an act of parliament, (as it seems that it was not) the incorporation made thereby was only an union, *jure feudali*, & *non jure proprietat*. *Vau.* 414.

* This Statute reminds one of the Fable of the Painter and Lion.

A few lines of history will satisfy any one, as to the idle pretence of *Wales*, being a part of the dominions of the crown of *England*. *Vide Caradoc's history of Wales*, englished by Dr. *Powell*, and augmented by *W. Wynne*, fellow of *Jesús College, Oxon.* Lond. 1774. p. 300, &c.

2. Subject to its Laws.

Wales, before the union with *England*, was governed by its own proper laws. *Vau.* 300, 399. *Cro. Car.* 247. *Jon.* 255. But by the *stat. of Rutland*, 12 Ed. 1. The king says, *leges et consuetudines partium illarum fecimus recitari, quibus intellet quosdam de concilio procerum delevimus, quosdam permisimus, quosdam correximus, et alias adjiciend' decrevimus.* *Vau.* 400.

And since, laws made in *England*, bind people in *Wales* if it be named, but not otherwise. *Vau.* 300, 400, 415.

And now by the *stat.* 17 H. 8. c. 26. All in *Wales* shall have and inherit all liberties, rights, privileges, and laws, in this realm, and all others his majesty's natural born subjects. And shall be inheritable to manors, lands, &c. in *Wales*, in the same manner and after the form of the *English* laws, without division or partition, and not after any tenure or form of *Welsh* laws and customs. And that the laws and statutes of this realm, and no other, shall be had, used and executed in the said dominion of *Wales*, in like manner, as in this realm, or as by this act shall be further established.

And therefore, the statutes, then made or afterwards to be made, are all introduced into *Wales.* *Vau.* 415.

3. Wales shall have its proper Counties.

By the *stat. Wallia*, 12 Ed. 1. There were six counties erected in *Wales*, viz *Anglesea, Carnarvon, Merioneth, Flint, Carmarthen, and Cardigan.* 4 *Inst.* 230. But the *stat.* 34 H. 8. c. 26. mentions *Glamorgan* and *Pembroke*, also, as ancient counties.

The marches of *Wales* were lordships lying between the counties of *England* and *Wales*, and not in any county. *Vau.* 415.

By the *stat.* 27 H. 8. c. 26. and 34 H. 8. c. 16. *Wales* was divided into 12 counties, for several lordships marches, were annexed

annexed to divers shires in *England*, and several to counties of *Wales*, (*viz.* to *Salop*, *Hereford*, and *Gloucester* in *England*, and to *Glamorgan*, *Carmarthen*, *Pembroke*, *Cardigan*, and *Merioneth* in *Wales*) and the residue were erected into five new counties, *viz.* *Monmouth*, *Brecknock*, *Radnor*, *Montgomery*, and *Denbigh*, of which *Monmouth* was annexed to the realm of *England*, and the four others to the dominion of *Wales*.

II. What Process goes to *Wales*, out of the Courts of Westminster.

1. Mandatory Writs.

To all the dominions acquired to the crown of *England*, some of the king's writs run: As, mandatory writs out of chancery. *Vau.* 401. Writs of safe-conduct of protection. *Id.* *Ne exeat regnum.* So a writ of error. *Id.* 402.

So a *certiorari* lies to the justices of the grand sessions in *Wales*, to remove an indictment for felony to *B. R.* 5 *Com. Dig.* 627. *Vide post.* *Div. IV.* So an *habeas corpus* to remove a person indicted there. *R.* 2 *Mod. Ca.* 137.

2. *Capias Utlagatum.*

A *capias utlagatum* always goes directed to the sheriffs of *Wales*; for it is in the nature of a mandatory writ. *Vau.* 397, 414.

By the *stat.* 1 *Ed.* 6. c. 10. All writs of special *capias utlagatum*, single *capias utlagatum*, *non molestandum*, and all other process for or against any person outlawed, may be directed to the sheriff of any of the counties in *Wales*.

III. What Process does not go thither.

The union of *Wales* to the kingdom of *England*, by the *stat.* *Wallia*, 12 *Ed.* 1. or by the *stat.* 27 *H.* 8. c. 26. does not subject *Wales*, to the jurisdiction of the courts of *England*. *Vau.* 400, 415.

And therefore, generally, *breve domini regis non currit in Wallia.* *Vide Lampley & al. v. Thomas & al.* 1 *Wils.* 193.

An original writ in a real action does not run in *Wales*. *Vau.* 417. And though real actions for a feignory, lands, church, &c. in the *marches* of *Wales*, were brought and tried in an adjoining county, before the *stat.* 27 *H.* 8. *c.* 26. Yet, since the statute they are not used. *Vau.* 417. *Vide post. Div. W.*

An appeal does not lie in a county next to *Wales*, for a murder committed in *Wales*. *R. Cro. Car.* 247.

An indictment in *Wales* for felony in the same county, shall not be removed by *certiorari*, to be tried in the county adjoining. *Vide* 5 *Com. Dig.* 628. who cites authorities, *pro* & *con.* *Vide ante, Div. II. No. 1. Vide* 2 *Mod. Ca.* 136. to 145.

A person indicted for murder in *Wales*, may be removed by *habeas corpus*, and tried in the next *English* county. 5 *Com. Dig.* 628. *Vide post. Div. IV.* also 1 *Wils.* 193, &c.

Judicial proofs, as a *capias ad satisfaciendum*, or *fieri facias*, upon a judgment, does not go to a sheriff in *Wales*. Though it be upon a judgment in *B. R.* Nor a *scire facias* upon a judgment against an heir and *tertenants*. Nor a *scire facias* against bail, who live in *Wales*. Nor a *testatum scire facias*. *Vide* 5 *Com. Dig.* 628. who cites various authorities, *pro* & *con.*

If a defendant dies after a judgment against him in *Wales*, and *A.* takes administration to him in *London*, the judgment in *Wales* shall not be removed by *certiorari* to *B. R.* or *C. B.* to enable the plaintiff to take a *scire facias* out of the superior court against the administrator. *R. Cro. Car.* 34.

But, in this case, the party is not without remedy, for, he may bring an action in any of the courts at *Westminster*, upon the judgment.

Breve domini regis de latitat non currit in Wallia, argued in *Lampley v. Thomas*, and adjudged in *Jones v. Jones.* 1 *Wils.* 193.

IV. Trials for Lands, &c. in Wales.

Real actions for a feignory or barony, within the *marches* of *Wales*, shall be brought and tried in the county within *England*, next to such feignory or barony. *Vau.* 412. *Vide action, Div. XII. No. 2.* And this seems founded upon an antient statute now lost. *Vau.* 404.

By the *stat.* 26 *H.* 8. *c.* 6. justices of peace, and gaol-delivery, in counties adjoining to *Wales*, may hear, &c. all felonies,

felonies, (and their accessaries,) committed in *Wales*. And this is not repealed by the *stat.* 34 & 35 *H. 8. c. 26* That judges of *Wales* may hold pleas of the crown, and shall inquire, &c. of all criminal offences committed within their limits; for the king hath a concurrent jurisdiction. 2 *Mod. Ca.* 145.

And therefore, a person indicted there for murder, after a *nolle prosequi* upon the indictment there, was removed by *habeas corpus* to *Hereford*, and there indicted, and tried, and convicted, and, after judgment against him in *B. R.* executed. *R. 2 Mod. Ca.* 136 & 145. The King *v. Orthos* and son.

The *nolle prosequi* upon the first indictment, was to avoid a trial in *Wales*.

I have stated this, because in that case, so it was: But, I trust, will never be drawn into precedent.

In God's name, let the party enjoy the benefit of the *nolle prosequi*; not for his own sake, but for the sake of all the subjects of the state, for the sake of justice and honour, for the sake of our laws and constitution, which having vested in the king an authority, to delegate to a law officer of the crown, a power to say, in a criminal case, the king will not prosecute; and the officer having exercised that authority, the law does, and must suppose the king's will is irrevocable; the party supposes so; and dismisses his witnesses, who may be able to prove his innocence. These witnesses may die, and then some malicious person may revive the prosecution, by procuring a revocation of the *nolle prosequi*, and convict an innocent man. Dreadful indeed would be the consequences, if such practices were permitted. Besides, in cases of murder, felony, &c. if the crown wantonly exercises its power, and will not prosecute, offenders may be proceeded against by appeal, and if convicted, must suffer death, as the crown cannot, in such cases, pardon. Another reason in favour of my observation is, as to keeping witnesses, an appeal must be prosecuted in a year and a day: But the time for prosecution by indictment, is not limited by any law.

But to proceed, trial in the next county for lands in *Wales*, extends only to a feigniory or barony within the marches there. *Vau.* 412.

It does not extend to any indictment or appeal for murder or any other felony there, which shall be tried in the *grand sessions*. *R. Jon* 255.

After issue joined, a *venire facias* shall be awarded for trial. And it may be returnable the day after the *teste*; for

the process shall be *de die in diem* in the same sessions. *R. Cro. Car.* 179.

If there be a bill in the *grand sessions* against *A.* and *B.* to which *A.* who lives there, appears, if *B.* upon service in *London* does not appear, his land in *Wales* may be sequestered. 5 *Com. Dig.* 628. says, *Dub. 2 Mod. Ca.* 374.

Vide more concerning *Wales* in *Action*, *Div. XII. No. 2.*

The judges of assize in an adjacent *English* county have concurrent jurisdiction in felonies, with the *grand sessions* through all *Wales*, and not in the lordships' marches only. *Stra.* 553.

An *habeas corpus* may be granted without an affidavit, to remove a prisoner indicted, to take his trial in the adjacent *English* county. *Id.* 945.

By the *stat. 13 Geo. 3. c. 51.* If a plaintiff in a personal, or a transitory action, where the cause arises in *Wales*, and is tried in the next *English* county, does not recover by verdict, debt or damages to 10*l.* and the judge certifies, that the defendant resided in *Wales* at the service of *mesne* process, judgment of nonsuit shall be entered, unless the judge certifies, that the title of land was chiefly in question, and the cause proper to be tried in an *English* county. But the plaintiff is to have his damages out of the defendant's costs; the verdict is a bar to another action for the same cause.

Justices shall not make deputies, but for calling courts, taking fines, &c.

The king may nominate a deputy, in case of sickness of a justice.

There may be special juries.

The justices may appoint persons to take affidavits and recognizances.

W R E C K.

Wreck, Flotsan, Jetsan, what shall be.

Wreck is, where goods, after shipwreck, are thrown upon the land, and no man, dog, or other animal, escapes alive out of the ship. 2 *Inst.* 166.

Flotsan, is where goods after shipwreck, lie floating or swimming upon the top of the water. *Bl. Nom. Verb. Flotsan.*

Jetsan,

Jetson, is any thing cast out of the ship, being in danger of a wreck, and beaten to the shore by the waves, or cast on it by the mariners. *Id. Verb. Flotsan.*

But, if any animal escapes alive to land, it will not be a wreck, for a dog and cat are only specified as examples. 2 *Inst.* 167.

So the king's goods shall not be a wreck, if the property be proved at any time. *Id.* 168.

If a ship, being in distress, all desert her, and any one come alive to land, though the ship afterwards perishes, there will be no wreck. *Id.* 167.

If a ship be pursued by enemies, and all the mariners to save their lives, desert the ship, and come to land, and the ship is vanquished by the enemies, and afterwards put to sea, and there perishes, it will be no wreck. *Id.* So, if a ship, being in a tempest, cuts its cable, the anchor is not wreck. 2 *Rot.* 159;

By the *stat. W. 1. 3. Ed. 1. 4.* (which is only a declaration of the common law) the things must be kept by view of the sheriff, coroner, king's bailiff, &c. and bailed in the hands of those of the town where found, and if any one proves property within a year and a day, they shall be restored to him, without delay; if not, they remain to the king. *Vau.* 164.

Wreck belongs to a subject by grant, or prescription. 2 *Inst.* 168. In which case, the sheriff, &c. must deliver the goods to the grantee. *Id.* If the sheriff, &c. does not do it, he shall be imprisoned and fined at the king's will, and render damages. *Id.* 166. 168.

By the words, *at the king's will*, must now be understood, not an arbitrary imposition, but a fine, the *quantum* of which is regulated by the sound discretion of the king's justices and antient usage.

If the goods are not kept by the sheriff, but taken away by the neighbours, the owner shall have a commission of *oyer and terminer* to enquire of the trespass, and to make restitution. *Id.* 168.

But, if the goods found are *bona peritura*, the sheriff may sell them within the year. *Id.*

The year and day, within which the owner may prove his property, shall be computed from the seizure, as *wreck*. *Id.* And, if the owner dies within that time, his executor or administrator may prove the property. *Id.*

Goods, which are *wreck*, pay no custom. *R. Vau.* 161. &c.

By *stat. 26 Geo. 2. c. 19.* Stealing from a wreck, wounding any person wrecked, or obstructing his escape, or putting out false lights, is felony without benefit of clergy.

But for goods of small value cast on shore, and stolen without circumstances of cruelty, the offender may be indicted and punished for petty larceny.

A justice of the peace may issue a search warrant for wrecked goods; or goods offered to sale, supposed wrecked, may be stopped, and the justice may commit the offender for six months, or 'till payment of treble the value.

Persons saving goods, and giving notice, or discovering concealed goods, intitled to salvage.

When a vessel is stranded, the nearest justice, &c. shall give notice for a meeting of the sheriff, justices, &c. to give assistance and adjust salvage. If the salvage is not paid, the officers of the customs may sell goods to pay it.

On oath of plunder, theft, or breaking ship, made and delivered to the clerk of the peace, he shall prosecute, on pain of 100*l.* The charges to be paid by the treasurer of the county.

Persons assaulting officers, employed in salvage, shall be transported for seven years.

Persons employed shall act under the orders of the master, owners, officer of the customs, of excise, sheriff, justice, mayor, commissioner of land-tax, chief constable, or petty-constable; on pain of 5*l.* or three months imprisonment.

The ship's name, &c. shall be sent upon oath to the secretary of the admiralty, and published in the gazette.

OF THE LAW CONCERNING, AND OF PROCEEDINGS BY, AND AGAINST PARTICULAR PERSONS.

Of the Law concerning Administration.

I. Administration.

By whom it shall be.

The administration of the personal estate of every one after his death, belongs to his executor, or administrator.

When,

When, by whom, and how administration shall be granted. *Vide post Administrator. Div. II. No. 1. &c.*

Who shall be executor *de son tort*, and how charged. *Vide post. Administrator, Div. III. No. 1. &c.*

II. Executor.

1. How appointed.

A man who makes a will, may thereby appoint his executor. And any words which denote the intent of the testator, that such an one shall have the care of his personal estate are sufficient to constitute him his executor: As, if he wills that *A.* shall have the administration of his goods. That *A.* shall have his goods to pay his debts. That *A.* shall have the residue of his goods, after his legacies, if he gives security to perform his will. That *A.* shall be overseer, and shall have the rule and disposition of his goods, and payment and receipt of his debts during the non-age of his executor; he shall be executor during the infancy of the other. Or, that none shall have any dealing with his goods, except *A.* during the minority of his son. That his wife shall pay all, and take all.

So, if he name *A.* his executor, and afterwards devise goods to *A.* and *B.* to dispose of for his soul; both are his executors. *Bro. Ex. 98.*

Qu. de hoc? as to all the other goods, except those devised to *A.* and *B.* I conceive *B.* merely a devisee in trust.

So, if he name *A.* his executor, and that *B.* shall administer with him, or in aid of him.

But if *B.* be made overseer to the executor, or a co-administrator, without more, he is not a co-executor.

A testator may name one, or more, his executors. Or, one for goods in one county, or kingdom, and another for goods in another country. Or, one for part of his goods, another for such a part. So he may name such an one his executor for such a time, and afterwards another. Or, such an one to be his executor upon such a condition, or contingency. Or, that upon such a condition to be performed *A.* shall be executor, otherwise *B.*

But where the condition is subsequent, *A.* shall be executor, until a breach. And where the condition is repugnant, as, that one of the executors shall not administer, it will be void. *1 Com. Dig. 253, 4.*

2. Who

2. *Who may be an Executor.*2. *A common Person.*

A testator may name every one, that he pleases, to be his executor. An infant, or in *ventre sa mere*, a *feme covert*, an alien. So, a man outlawed, or convicted, or attainted.

So, if an executor become bankrupt, the probate by him shall not be revoked.

But a corporation aggregate cannot be an executor; for it cannot take an oath to make probate of the will. 1 Com. Dig. 254.

3. *The King.*

So the King may be an executor. But the King shall appoint commissioners to administer for him, who shall sue, and be sued. 1 Com. Dig. 254.

4. *When an Executor may refuse.*

An executor may refuse before the ordinary to be executor. And if the bishop himself be made executor, he may refuse before his commissary. And if the executor send a letter, &c. to the ordinary, by which he renounces, and the refusal be recorded, it is sufficient. So, if a debtee being named executor, sue the ordinary for the debt, that amounts to a refusal. So, if an executor plead, never executor, nor ever administered as executor. 9 Co. 36. b.

But after administration, an executor cannot refuse. So, after an oath taken before a surrogate, he cannot refuse, though a *caveat* be entered. And if administration be granted upon a refusal, after he hath administered, it may be repealed. *Vide post. Administrator, Div. II. No. 1. 8.*

If the executor refuse, and administration be granted, he cannot afterwards prove the will. So, he cannot accept the executorship, and afterwards refuse a term for years, &c. *Vide post. No 10.*

Yet, if an executor does not refuse, but only makes default upon a citation to prove the will, and upon that administration is granted, he may afterwards prove the will. So, if one executor appears and proves the will, although the other refuses, he may afterwards prove the will; for he continues

continues executor, notwithstanding his refusal. And may release a debt; and shall be joined in a suit, &c. 1 *Com. Dig.* 255.

If there are two executors and one renounces, yet he may still come in whenever he pleases, and demand probate; but if both renounce, the administration is granted; it is otherwise. 3 *P. W.* 249. 3 *Burr.* 1463.

5. *When his Debt shall be released.*

When an executor is indebted to the testator, his debt shall be released; for the executor cannot maintain an action against himself. And therefore, if the executor was indebted upon bond, or otherwise, to the testator, the debt shall be released. So, if the testator make one debtor his executor, where several are jointly bound or indebted to him, it shall be a release to all. So, if he make the wife of one obligor, or debtor his executrix, though the testator was within age. Though the executor does not prove the will, nor administer. So, if he make his debtor and others his executors, the debt is released; for they must all join in a suit. And if the executor, who was indebted to the testator, dies, an action does not lie against his executor or administrator for the debt; for a personal thing suspended is extinct. Nor against the surviving executor, where there was another executor. Though he dies before he administers. Or, does not join in the probate of the will.

If the obligor make the obligee executor, who agrees; the debt shall not be discharged, but he may retain assets to the value. *Jon.* 345.

That is, where there are assets sufficient to pay all the debts of an higher nature, or there are not any debts of an higher, though there may be of an equal nature.

If the testator make his creditor executor, the action shall be released, but the debt remains for which he may retain. *Vide post. Div. IN. No. 1, 2.*

But if the debtor be executor; though the action be released, the debt shall be assets in his hands, for satisfaction of other creditors and legatees.

If *A.* and *B.* are bound to *D.* and *A.* makes *D.* and *F.* executors, and *D.* refuses, the debt is not released.

So, if a man make the executor of one obligor or debtor his executor; it is no release of the action; for the other obligor or debtor may be sued by such executor; if he hath

hath not assets of the other obligor in his hands. So, if a woman executrix takes to husband the debtor of her testator, the debt is not released, but the action suspended only during the coverture. So, if the ordinary commit administration to the debtor of an intestate, it is not any release of the debt. So, if the executor of one obligor make the obligee his executor, he may sue the other obligor, if he is not satisfied by the assets of the deceased obligor. So, if the obligor make the obligee his executor, and there are not assets, he may sue the heir. So, if the obligee make the obligor his executor, and he refuses before the ordinary, it shall not be a release. 1 Com. Dig. 255, 6.

If a man devises all his real and personal estate not before devised to his two executors as tenants in common, and one of them is indebted by bond to the testator; this debt (notwithstanding the strongest parol evidence to the contrary) is not released, and he shall account with the other executor and residuary legatee for the money. Cal. temp. Ld., Talbot. 240.

6. The Duty of an Executor.

6. He must make Probate of the Will.

By whom the probate shall be.

The probate of wills does not belong to the spiritual court, by the civil or canon law. Nor originally by the common law. But it was established to the spiritual court before the time of Hen. 2. And now belongs to it only for things personal.

Yet, by the custom of some manors, probate of wills belongs to the Lord. And this, in a will of goods, as well as of lands.

If the testator had *bona notabilia*, the probate belongs to the archbishop of the province. Vide post, Administrator, Div. II. No. 3.

So the probate of the will of a bishop, belongs to the archbishop of the province, though he had not any goods out of his diocese.

If the testator had not *bona notabilia*, it belongs to the bishop of the diocese generally. Vide post, Administrator, Div. II. No. 5.

What are *bona notabilia*, Vide Id. No. 4.

If

If the probate be by a bishop, or other inferior judge, when it does not belong to him, it is void. *Vide Id. No. 5.*

But if it be by the metropolitan, when it does not belong to him, it is only voidable. *Vide Id. No. 3.*

The ordinary cannot insist upon security from the executor before the grant of the probate. Or, refuse to grant probate to the executor, because he is incapable, by the canon law. And if he refuse the probate to him, who ought to have it, a *mandamus* lies against him. 1 *Com. Dig.* 256, 7.

If there are not *bona notabilia*, and probate is granted by the archbishop, this is only a voidable probate, and must be avoided before a probate can be granted by the bishop. *Stra.* 73.

The spiritual court cannot refuse to grant probate pending a commission of appraisement; if they do, a peremptory *mandamus* shall issue. *Stra.* 857.

7. He must exhibit an Inventory.

By the *stat. 21 H. 8. c. 5.* the executor, or administrator calling two creditors or legatees, or otherwise two honest persons, in their presence, and by their discretion shall make a true and perfect inventory of all the deceased's goods and chattels, &c. and one part thereof on oath to deliver to the ordinary, and the other keep himself.

The ordinary shall not refuse the inventory tendered. He may convene the executor to make or refuse probate, and bring in an inventory, &c. and shall deliver a copy of the testament, or inventory, to any requesting the same, taking no more for search and copy than is due to the scribe for registering the same, or 1d. for every ten lines ten inches in length, at his election.

The inventory contains only goods, chattels, wares and merchandizes, and not things in action, &c. nor by the *stat. 21 H. 8. c. 5.* money arising from the sale of lands devised to be sold.

The ordinary may respite, or dispense with the inventory, if the debts and legacies are paid. Though a legatee sues for his legacy, who will not accept it, when it is tendered 1 *Com. Dig.* 257.

The spiritual court cannot falsify an inventory at the suit of a creditor; and if they do, prohibition shall go, after sentence. 3 *Burr.* 1922.

8. *Charge of Probate, or Inventory.*

By the *stat.* 21 *H.* 8. c. 5. the ordinary shall take for probate of the testament, registering and inventory 6d. when goods exceeds not 5l. when they do not exceed 40l. 3s. 6d. when they exceed 40l. 5s. or 1d. for every ten lines ten inches in length, at his election, and like rates for granting administration, &c. on pain of 10l. to the king and party aggrieved, &c. *Vide the stat.* And if he takes more it will be extortion. He shall take nothing for the examination of the transcript with the original, but what is agreed. 1 *Com. Dig.* 257, 8.

9. *What Things he may do before Probate.*

The property of the goods is vested in the executor before probate. And he may administer them, or give, or alienate them. So he may release a debt before probate, pay and receive debts. So a release to an executor before probate is good, if he afterwards prove the will.

So he may assent to a legacy. So, if *A.* take administration, and take goods out of the possession of the executor, trespass lies against him; for the administration is void.

So he may commence an action before probate, though he shall not declare. Or, avow for rent incident to a reversion for years, which he hath, as executor. So he may be sued before probate. So after probate an executor may have trespass against him, who takes goods after the death of his testator by an administration granted to him.

But an executor cannot maintain an action before probate. Yet trespass, trover, &c. for goods taken out of his own possession he may maintain before probate; for there a profert of letters testamentary is not necessary, 1 *Com. Dig.* 258. cites *Off. Ex.* 30.

But *qu.* as to trover, for goods never in his possession, must he not shew a title, and hath he any until probate granted? He may renounce, and administration, with the will annexed, be granted to some other person.

If *A.* be executor for so many years, and afterwards *B.* be named executor, and *A.* prove the will; after his time expired, *B.* may sue without another probate, *Anon. Chan. Caf.* 265. *Qu.*?

If an executor commence an action before probate, and afterwards prove the will, it shall be good by relation between the parties, for it is sufficient, if the probate appears upon the face of the declaration.

Yet an arrest before probate, is not good, as to a stranger; though the executor afterwards prove the will. 3 *Lev.* 58. So a person cannot commence an action as administrator, before administration granted. 1 *Com. Dig.* 258.

Probate by any one executor, (where there are more,) enables all to bring actions. *Hensloe's Ca.* 9. Co. 38. a. *Sed quæ* if they can declare? I am inclined to think they may.

If an executor before probate, files a bill in equity, his subsequent proving the will makes the bill good. 3 *P. W.* 349. *Quæ* must it not be before answer?

10. *What Interest an Executor, or Administrator hath in the Goods of the Deceased.*

An executor, or administrator hath the property of the goods of his testator, or intestate vested in him before his actual possession. And therefore may have *trover*, trespass, &c. against him who takes them before he hath actual possession of them. *Vide post* No. 13. *Vide Action upon the Case upon Trover.* Div. II. *Vide Infra.*

And, though he do not prove the will for a long time after the death of the testator, yet the property shall be adjudged in him, immediately after the death of the testator.

So, though administration be not granted for a long time, yet, when it is granted, it vests the property in the administrator, by relation, from the time of the death of the intestate.

If the testator had a term for years, this vests in the executor, or administrator; and he cannot refuse it, though it is not worth any thing. *Vide ante* No. 4.

But an executor, or administrator cannot devise the goods of the testator, or intestate. Nor, shall they be taken in execution for the proper debt of the executor, or administrator.

If an executor, or administrator pay debts with his own goods, it will be an administration for so much of the goods of the testator, &c. and he shall have them afterwards in his own right,

If he give goods to *A.* in satisfaction of the expence at the funeral, and afterwards take administration, he cannot have *trover* against *A.* for the goods.

If he assign to *A.* a bond due from *B.* to the testator in satisfaction, the administrator *de bonis non*, &c. shall not afterwards sue *B.* *Skin.* 143.

B. R. may make a rule by consent that probate shall be granted to two executors, *A.* and *B.* but that *A.* shall not intermeddle, and that *B.* shall indemnify him. 3 *Burr.* 1463.

11. *How they represent the Testator, or intestate.*

An executor, or administrator represents the person of his testator, or intestate. And therefore, if money be payable to *B.* without naming his executor, yet his executor, or administrator, shall have an action for it. So, if money be payable to *A.* or his assigns, his executor shall take it, for he is assignee in law.

So, if a man, reciting that he hath 1000*l.* of *B.*'s money, covenants, that so long as he hath the money in his hands, he will pay 50*l.* annually to *B.* his executor shall have an action for it, for it appears, that it was intended for the interest of the 1000*l.* which the executor shall have.

If money is awarded to *B.* and that he shall release; the executor of *B.* shall have the money, and make the release, though his testator died before the day of payment.

So, if *A.* be bound by bond to perform an award, and it be awarded, that *A.* shall pay 20*l.* at *Michaelmas* to *B.* and before *Michaelmas* *A.* dies, his executor shall pay it; for it was a duty vested in *B.*

So, if *A.* be bound by bond to pay 60*l.* to *B.* if he does not prove before the 10th of *November* next, that it was paid; and *A.* dies before the 10th of *November.*

But if an annuity be given to *B.* during the life of the testator's wife, upon condition that he be civil to his wife, and *B.* dies before the wife, his executor shall not have it; for it was personal to *B.*

12. *If there are several Executors, or Administrators, their Interest is intire.*

If there are several executors, or administrators, they have a joint and intire interest in all the goods of the testator,
or

or intestate, which cannot be divided : and therefore, if one disposes of all the goods without the others, it will be good for all. Though it be a chattel-real ; as term for years. So a surrender of a term by one is good for all. A release of a debt by one is good for all. An attornment by one is good for all. If one confess a judgment, the judgment shall be against all. *Dy. 23. b. in marg.* But *vide infra*.

So one cannot demand an account of the profits of the estate against the others. So one cannot demand a partition of the goods, against the others.

So, if one give a bond (part of the assets) to a stranger, for his (the executor's) debt, detainee does not lie by the other surviving executor, against the stranger, for this bond, though it was only a *chose in action*. So, if he deliver a bond of the testator to a stranger ; though the debt is not lost thereby. *Dy. 22. b. Moor. 9.*

So if he pay his own money for a debt of the testator, and die ; the survivor shall not have an action against his executor for goods of the first testator, which do not exceed the value of the debt paid with his own money. So one cannot give so much of the goods to the other. *1 Com. Dig. 260.*

One, of three executors, gave warrant of attorney, to confess a judgment against him, and co executors ; judgment entered against all the executors, *de bonis testatoris*, for the debt, and against the executor who gave the warrant, *de bonis propriis* for the costs, was held ill, and set aside on motion, for executors may plead different pleas. *Stra. 20.*

One administrator cannot release a debt, or convey an interest, so as to bind another, though one executor can. *1 Atkyns 460.*

If two tenants in common put out money as joint-executors, it shall not survive, but go to their respective representatives. *1 Atkyns 467.*

The power of executors is not determined by the death of one, but survives to the other ; therefore if a legacy is left to *A.* payable as two executors think fit, (and if *A.* dies without issue to revert,) and one executor dies, the survivor may direct the whole to be paid to *A.* *3 Atkyns 509.*

If there is judgment against *A.* partner, and one of the executors of *B.* for a partnership debt, *A.* may give a mortgage of the separate estate of *B.* the testator, as a further security, and equity will order satisfaction out of the mortgage, without sending them to law. *2 Vesey 265.*

13. *What Actions an Executor, or Administrator shall have.*

An executor, or administrator may have an action upon a judgment, statute, recognizance, obligation, or other speciality made to his testator, or intestate. So he may have covenant, upon a covenant made to his testator for a personal thing. Or, upon a covenant that touches the realty, if it be broken in the life of the testator. So, upon any contract made with the testator. Though the contract, or promise to the testator be for the benefit of a stranger. Though the obligation, &c. was for performance of an award. Though it be upon a simple contract.

So an executor or administrator shall have *replevin* for goods taken in the life of the testator.

So he shall have a writ of error, attain, or deceit. An *audita querela*. An action for a relief due to the testator.

But by the common law, an executor, or administrator had not an action for a wrong done to the testator in his life-time: as, for a trespass in taking his goods, &c. So he had not an action founded upon a matter in the privity of the testator; as, account.

Yet now, by the *stat. 4 Ed. 3. c. 7.* an executor shall have an action for a trespass to the testator in his life-time. So, by the *stat. 13 Ed. 1. W. 2. c. 23.* an executor shall have an action of account upon an account with his testator.

By the *stat. 25 Ed. 3. c. 5.* the executor of an executor shall have an action of debt, account, trespass, &c. as well as the testator. *Vide post. Div. VII.*

And by the *stat. 31 Ed. 3. c. 11.* administrators may have the same actions to demand, or recover, as executors. And therefore now, an executor or administrator shall have trespass, or *trover*, for the goods of the testator, taken in his life-time.

So, trespass for taking away the grass growing upon the land of the testator. 1 *Vent.* 187.

So, by the equity of this statute an executor, or administrator shall have every action for a wrong done to the personal estate of his testator. So he shall have debt upon the *stat. 1 Ed. 6. c. 13.* for not setting out tithes. Debt upon a judgment against an executor, or administrator, upon a suggestion of a *devastavit*. So he shall have a *quare impedit*, for a disturbance in the life-time of the testator.

So

So he shall have an action upon the case against the Sheriff, for an escape of one taken for debt. If the escape was after judgment.

Qu. if he shall not have it for an escape on mesne process? *Vide* 1 Com. Dig. 261. Several references to cases where it was dubious.

So, for not returning his writ, and paying money levied upon a *fieri facias*. Or, for a false return, that he had not levied the debt.

So, for an escape, though it was in the life-time of his testator. *Vide infra*. So an executor shall sue, for an escape of one in execution, upon a judgment by him as administrator, where he had obtained letters of administration, not knowing of a will, which was afterwards found, whereby plaintiff was appointed executor. 1 Rol. 276.

But since these statutes an executor, or administrator cannot have an action for a wrong to the person of his testator; as, for a battery, imprisonment, &c.

Nor, for a prejudice to the freehold of the testator; as, wherefore he cut and carried away the grass, for the grass is part of the freehold. 1 Com. Dig. 260, 1.

An executor or administrator shall have an action on the case against an officer for removing goods taken in execution before the testator, &c. (the landlord,) was paid a year's rent. *Stra.* 212.

The executor of the assignee of a bail-bond shall have an action; it is an interest vested. *Fort.* 367.

14. *What Actions will lie against them.*

An action lies against an executor, or administrator upon every contract, debt, or covenant made by his testator, or intestate, which appears by any record, or specialty. Though it be a specialty of an inferior nature; as, fines, issues, &c. at assises, quarter-sessions, by commission of sewers, or bankrupts, or at the leet, &c. *Off. Exr.* 169.

So debt lies against the executors of a sheriff, upon a judgment in an action against the sheriff for an escape.

So upon any debt, or contract without specialty, where the testator could not have waged his law: as, in debt for rent upon a parol lease. So debt lies against an executor by a gaoler, for the meat and drink of the testator in prison; for in such case he could not have waged his law. So upon an obligation, or covenant to instruct an apprentice in his trade;

trade; though it sounds as a personal act. So, upon a debt, covenant, contract, &c. which commences by consent of the parties; though it found in *tort*, and damage. So, for rent upon a covenant in law. Action upon the case, upon an *assumpsit* in law. So, upon a special, or collateral promise of the testator

So it lies against an executor, or administrator of one, who takes the fifths due to a minister by the *stat. 12 Car. 2. c. 17.*

Or, of a sheriff, who hath levied money upon a *feri facias*, and not paid it. Or, of a common carrier, for goods lost by him. Or, of an intruder upon the king, who cuts trees, &c. of value.

Or, for a relief due by his testator to the lord of the manor.

So an attaint upon the *stat. 23 H. 8. c. 3.* lies against an executor, though the statute speaks only of an attaint between the parties, and says nothing of the heirs, or executors. 1 *And. 34, 5.*

15. What not

But an action does not lie against an executor, or administrator, where the testator might have waged his law: As, in debt upon a simple contract. 9 *Co. 87. b. R. Cro. El. 600. R. 2 H. 4. 14. b.*

Where one may wage his law. *Vide Com. Dig. tit. Pleader 2 W. 45.*

Nor, debt upon a *concessit solvere* by custom in an inferior court; for he will be ousted of his law by such means. Nor, debt upon a submission by *parol*, and an arbitrament in the life-time of the testator. And if there be debt upon a simple contract, it will be error; though the defendant plead, or suffer judgment by *nil dicit*.

Nor, for a personal wrong by the testator, or intestate; as trespass does not lie against an executor, or administrator, for a trespass done by the testator, or intestate, to the lands, or goods of another. Or to his person by battery, &c.

Nor, does it lie against the executor of a gaoler, &c. for an escape. Nor, debt upon the *stat. 2 Ed. 6. c. 13.* for not setting out tithes, against an executor. So waste does not lie against an executor, or administrator. Nor, an action upon a penal statute.

So debt does not lie against an executor upon a suggestion of a *devastavit* by his testator, *cont.* if the testator was executor *de son tort.* per *Turner, Ch. B. 2 Lev. 133.*

So,

So, *trover* does not lie against an executor, upon a *trover*, and conversion by his testator. *Per Jones, Pal. 330. Vide cont. 2 New Abr. 445. Sed qu?*

If a man does work in expectation of a legacy, he cannot sue the executor. *Stra. 728.*

III. The Manner of the Administration.

1. By Payment of Debts.

The office of an executor, or administrator consists principally in the care of the funeral, in the probate of the will, in the payment of debts, and the payment of, or assent to legacies.

Nothing shall be allowed to an executor, or administrator for funerals, but the necessary fees and expence. Yet, if there are assets sufficient, the allowance shall be according to the quality and degree.

So, for the probate nothing shall be expended but the fees allowed by the *stat. 21 H. 8. c. 5. Vide ante, Div. II. No. 8.*

So nothing shall be allowed, if he compounds a debt, but that which he actually pays. So, if he pays a less sum upon a judgment, obligation forfeited, &c.

All the debts of the testator, or intestate ought to be paid, though they are upon simple contract.

If the executor, or administrator pay a debt of his testator, or intestate, with his own money, it will be an administration for so much.

So if he retain to satisfy a debt to himself. *1 Com. Dig. 263.*

I have before observed *tantamount* to this, that debts of an higher nature must not remain unpaid.

So, if one obligor make the executrix of the obligee his executrix, and leave assets, the debts shall be presently satisfied by these assets, and no action lies against the other obligor.

So, if the executor, without covin, give a bond for a debt of the testator, and the testator's estate be discharged. *1 Com. Dig. 263.*

The court will not allow an executor or trustee any thing for his time and trouble, especially if there is a legacy given him, even though it appears he deserved more. *3 P. W. 249.*

If the intestate dies, indebted for rent, and the administrator becomes also indebted for rent of the same premises in his own right, and pays a sum in discharge of part of the intestate's debt, and then another sum, without saying on what account, it shall be presumed it was still in discharge of intestate's debt, and not of his own. *Andr.* 55.

Testator dies indebted to plaintiff for coals, his wife (executrix) receives more coals on her own account, marries defendant, who also receives more coals on his own account, and makes several payments on account generally, which were sufficient to discharge the debts due from the testator, and from the wife whilst sole, and plaintiff sues defendant only. Plaintiff not having any directions from defendant, may apply the payments as he pleases, though defendant had the first right. *Stra.* 1194.

2. In what Order it shall be.

The executor, or administrator ought to pay a debt due to the king, before any other. So, a debt upon bond to the king, though it be not upon record, shall be satisfied before any other. So, a debt forfeited by outlawry. And, if he be sued for another debt, he may plead the debt to the king and no assets *ultra*. So, if execution be sued against him upon a statute or recognizance, when he is indebted to the king, he may have an *audita querela*. So outlawry upon a judgment, where the land is seised, shall be satisfied before a judgment prior to the outlawry.

But this extends not to a debt of the king, that is not of record: as, upon a contract for tin, &c. Nor to a fine for admittance to a copyhold of a manor of the king. Nor to an amercement in a court of the king, not of record. Nor, to a fee farm rent, or other rent to the king, not due upon record. *Dub. Off. Ex.* 193. Nor, to a debt forfeited to the king by outlawry upon mesne process, &c. assigned to the king.

He who pleads a debt due to the king, must shew the record in certain.

After a debt to the king upon record, the executor or administrator ought to pay a debt due by judgment. And this shall be paid, before a debt upon a statute or recognizance of an older date. Though the judgment be by confession, after a suit commenced. Though it be in an inferior court of record. Though the judgment be obtained for

for a debt upon simple contract. And obtained against the executor, or administrator himself. Or, against one executor only, where there are several. Or, against an executor by the name of administrator; or *e contra*.

Though a debt upon specialty be sued before the debt upon judgment demanded. Though the judgment be confessed, after a bill in equity by a bond creditor.

Though the judgment be entered, after the death of the testator, upon a verdict in his life-time. *Vide post. this Div.*

But all judgments are equal, and a later may be paid before a former. Though debt be brought upon the judgment; for that is not a waiver of the judgment.

So a judgment upon a *scire facias* upon a recognizance, &c. that he may have execution, shall be equal to a judgment, that he recover.

But a judgment, with a defeasance executory, which is not yet broken, shall not be paid before other debts.

So, if he hath not any notice of a judgment, a statute, or a recognizance, may be paid before it. 3 *Mod.* 115.

Sed qu. de hoc? As judgments are upon record in the king's courts, which are open to the inspection of all persons, and I conceive it is the duty of the executor, &c. to search if there is any judgment against his testator.

If he confess a judgment upon a simple contract, and afterwards judgment is given against him upon a bond, he cannot pay the second judgment without the first; for he might have pleaded the first, if he had not had assets for both.

When all the judgments are equal, to a *scire facias* upon a judgment *quare executionem non*, &c. the defendant cannot plead another judgment of an older or later date, and no assets *ultra*. Nor in debt upon a judgment.

After judgments, debts due by statute or recognizance shall be paid before others.

So a decree in equity is equal to a judgment. *R. per three Bar. Powel cont. 3 Lev. 355: per Cowper, Sal. Sal. 507. R. 2 Ver. 89.* Next to a judgment; and though an executor or administrator cannot plead it, he shall be aided in equity. 1 *Ver.* 143.

A statute or recognizance shall be intended for debt, if the contrary does not appear on the other side. And shall be paid before a debt upon specialty; though the statute is not yet due.

But debts by statute, or recognizance are in equal degree, and the executor or administrator may satisfy which he will

first. And may pay a later, before another of an older date.

So, if a statute, or recognizance be for performance of covenants not broken, he ought to pay debts by specialty before them.

After judgments, statutes, and recognizances, the executor, or administrator ought to pay debts upon specialty. And he ought to pay a debt upon specialty before a debt upon simple contract, though the bond is not yet due. And he ought to pay debts upon specialty before a debt upon simple contract, though he be not sued for them.

After debts by specialty, debts by simple contract are to be paid. And he may pay debts by simple contract before a covenant not broken.

But an executor, or administrator may retain to satisfy his own debt, before he pays another debt of equal degree. Otherwise, if the debt to the other be of an higher nature.

An executor *de son tort* cannot retain for his own debt. *Vide Administrator. Div. III. No. 3.*

His only way (if a creditor) will be, to plead *plene administravit*, and get letters of administration, before trial of the cause.

An administrator *durante minore etate* may retain for his own debt. *Vide post. VI.*

And he may retain, tho' the testator's bond, be to another, for money to be paid to the administrator. *Semb. Ray. 484.*

So he may pay amends or satisfaction for a covenant broken, before a bond; for they are in equal degree, and he may pay which he pleases first.

Or rent due upon a lease for years. Though it be a lease by *parol*. And though the lease be determined.

So where debts are in equal degree, he may pay the whole to one, leaving nothing for the other. Though the debt of the other was first demanded. 1 *Com. Dig.* 266. *Dub. Off. Ex.* 206. But there is not any reason to doubt, as if he makes payment to one before the other sue, he may plead *plene administravit*, and no assets at the commencement of the suit. If he has not paid, the other may commence a suit, to which the executor, &c. may immediately confess judgment, and plead it to the first action: however such preferences ought not to be given without very good, fair, and substantial reasons. Where the estate is insolvent, and all the debts of an equal degree, the assets ought to be divided among the creditors, in proportion to their respective debts. If any
refuse

refuse so fair a proposal, it may then be right, to confess a judgment, or judgments; to some of the other creditors in trust for themselves, and those that will come in, supposing the outstanding creditors sue. If they do not, distribution may be made to others, without the assistance of a judgment, as the representative may, if occasion requires, afterwards plead, fully administered.

As to payment of debts of an equal degree, viz. paying some wholly and leaving others entirely unpaid, it is not material though the debt paid was not due at the death of the testator, but became due afterwards. So, if a suit be commenced by one, he may pay the other, before he hath notice of the suit.

So, if the suit be in equity, he may pay debts of an equal or higher nature, before a decree.

The return of summons, or distress of the sheriff is not notice, if he be not personally summoned. *Dal.* 37.

Qu. If the summons be left at his house?

After notice of a suit, he cannot pay another debt of the same, or inferior degree, before judgment for it. And therefore if he be sued upon a bond, he cannot pay another bond not sued before it. *2 Cro.* 9. for upon *plene administravit*, he cannot give in evidence, payment after the action commenced. *R. D.* 32. *a.* Or, if he hath paid since the action, before notice, he ought to plead, that he had not notice until such a day, and *plene administravit* before. *1 Com. Dig.* 264-6.

Creditors by judgment at law, and creditors by decree in equity, shall be equally paid by an executor, without preference. *Bunb.* 48.

If *A.* and *B.* are partners, and *A.* gives bond to a trustee to pay his wife 1000*l.* at his death, and dies, and *B.* administers; this bond hath preference as to *A.*'s separate estate, but as to partnership estate, shall come after all partnership creditors. *3 P. W.* 180.

The executor of an executor who intermeddles with goods, but dies before probate or election made to retain, may retain to satisfy his debt. *Semb. Ibid.*

Judgment against an intestate, entered in his life-time, must be preferred. *3 P. W.* 398.

The statute of frauds, which enacts that judgments shall bind land, but from the signing, concerns only purchasers, and not creditors: therefore judgments on warrants of attorney, entered after intestate's death, are good judgments, from

from the first day of term, when intestate was alive. 3 *P. W.* 398.

If two sisters intitled to several sums of money, and to an account of their father's personal estate, agree to let those sums remain with their brother on his giving them a bond for 1000*l.* they shall be creditors for a valuable consideration, though the money did not amount to so much. 3 *Atkyns* 481.

If *A.* in his life-time hath covenanted with *B.* and *C.* to leave by his will (or that his executors, &c. shall pay) 700*l.* to them, in trust, to pay the interest to his wife for life, then to be divided among their children, and for default, as he shall appoint; and binds himself, his heirs, &c. in a penalty for performance, and dies without issue and intestate; *B.* administers, he may retain assets against a bond creditor. 3 *Burr.* 1380.

3. By Payment of Legacies.

After debts, an executor, or administrator *cum testamento annexo* ought to pay the legacies given by the testator. And an executor, or administrator was compellable to account before the ordinary by the common law, though he was not bound to swear to or prove his account; when cited *ex officio*, or by a creditor.

So, at the suit of a legatee he was compellable to prove his account, if there were no assets upon the account delivered, and he would not pay the legacy. So now, at the suit of a person intitled to distribution; for he is in nature of a legatee,

So, where an administrator gives a bond according to the statute 22 & 23 *Car. 2. c. 10.* to make account at such a day, and will administer, he must give in his account at the day, without citation, if a court be then held. And such account may be examined at the instance of any, who hath an interest in it.

Yet, otherwise it shall not be examined. Nor shall a creditor have an assignment of the bond to sue for non-payment of a debt due to him, or for a *devastavit*, &c.

But an executor ought not to pay a legacy to him, who cannot take it.

If there are not assets for all the legacies, the legatees must abate in proportion. And the executor may take security to refund, if debt afterwards appear. And therefore, if he pay legacies without security to refund, and a debt afterwards appears, it will be a *devastavit*. *Vide post. Div. IX.* Though
it

it be for a covenant broken after the legacy paid. 1 *Com. Dig.* 266, 7.

Payment of a legacy into the hands of an infant is good. *Bunb.* 240.

4. *By performing according to his power or Trust.*

If the testator gives his executor a power, or authority for any particular purpose, he ought to pursue his power, or authority strictly, according to the intent of the testator.

5. *By Assent to a legacy.*

When necessary.

If a man devise lands, which he hath in fee, to another in fee, in tail, or for life, the devisee may enter without the assent of the heir, or executor. And the freehold will be in him before entry. So, if he devise to another for years, the devisee may enter without assent. And if the heir enter before the devisee, he may have an *ex gravi querela*. *Co. Lit.* 111. a.

This mode of proceeding is now obsolete, an ejectment is much more eligible.

But, if a man devise to another goods or chattels real or personal, the devisee cannot take them, without the assent of the executor. Though the goods are at the death of the testator in the hands of the legatee himself. Though the testator appoint, that he may take them without assent. Though the devise be of goods *in specie*.

So, if the devise be to the executor himself, he shall take them as executor until his election to have them as legatee.

Although all the debts are paid, without the term, or chattel devised to the executor.

Devise of a term for years to the executor for life, he takes as executor and not as legatee. Unless a special assent thereto, as to a legacy; as paying a sum charged thereon. *Str.* 70.

6. *What shall be an Assent.*

The assent of an executor shall be express, or implied. And therefore, if the executor request the legatee to dispose of the legacy, that amounts to an assent. Or, send another to the legatee to purchase it of him. Or offer money to the legatee for the purchase.

So,

So, if the executor take a grant, lease, &c. from the legatee, of the thing, or term devised. Or, a grant, &c. in trust for the legatee.

So, if the legatee himself be executor, and says, he will take according to the will, that amounts to an assent to have it as legatee. Or, reciting, that he hath a term by devise, grants it over. So, if he takes the profits to his own use. Or, repair the tenements devised at his own charge. Or, perform a condition, or trust, &c. annexed to the devise. Or, exclude a co-executor.

So, if a term be devised to the executor for life, and afterwards to another; if he says, that the other will have it after him, it will be an assent to have it as executor. 1 *Lev.* 25.

So, an assent to an estate in remainder, is an assent to a present estate. And an assent to the first estate, is an assent to the devise over.

So an assent to a devise of a chattel lease, is an assent to the devise of a rent out of it. Or, to a condition, or contingency annexed.

So, an assent to take part as residuary legatee, is an assent to take the whole residue as legatee. 1 *Com. Dig.* 267, 8.

7. *What not.*

But, if the executor, being a legatee, enter into the term, but do not prove the will, that does not amount to an assent to have it as legatee. Or, if he say, that the testator left all to him.

If an executor, being a legatee, lease, &c. by the name of executor, that amounts to a claim as executor.

8. *By whom it shall be.*

If there are several executors, an assent by one is sufficient.

If the devise be to one executor, he may take by his own assent, without the others. So, if there be a devise to all the executors generally, one of them may assent for his part.

If a wife be executrix, the assent of her husband is sufficient. And the husband may elect for his wife, to take as legatee.

So

So an executor may assent to a legacy, before probate. *Vide ante Div. II. No. 9.*

But a *feme covert*, cannot assent to a legacy. *Vide 1 Sid. 188.*

Nor, an executor within the age of seventeen years.

If an executor refuse his assent without cause, he may be compelled to it, by a court of equity. And, if he once assent, he cannot afterwards dissent.

If he assent upon a condition subsequent, the condition is void. *1 Com. Dig. 268.*

IV. Administration by a Feme Covert.

If a *feme covert* be named executrix, she may administer, without the assent of her husband. And if she proves the will, a refusal by the husband is of no avail. So, if she refuse, an acceptance by the husband is of no avail.

So, if a *feme covert* be next of kin to an intestate, administration shall be granted to her. *Vide Administrator, Div. II. No. 6.*

But, if a *feme covert* be executrix, or administratrix, administration by the husband, binds her. So, if he administer without her assent. And a gift, or release by the husband alone, is good. So, if the husband alone, recover a debt due to the wife, as executrix, upon a promise to him, it will be a *devastavit* for so much. So, if the husband esloins the goods, it will be a *devastavit* by the wife.

So, the wife, without her husband, cannot dispose of the testator's goods. So, if the wife alone release a debt without payment, it is not good. *1 Com. Dig. 269. cites Off. Ex. 297. cont. 1 And. 117.*

Yet the goods of the testator are not vested in the husband. And the husband cannot sue, or be sued in right of the testator, without his wife. *1 Com. Dig. 269.*

V. Administration by an Infant Executor, after Seventeen.

After the age of seventeen, and before twenty-one, an infant executor may administer, and may discharge a debt upon payment. And sell a chattel real, &c. for payment of debts. So, if a sale by an infant executor be for money for the debts of the testator, and for payment of what he himself owes for necessaries, it will be good. Though the sale be at an under value.

But a release by an infant executor, for more than he received, is void for so much. So, if he release a bond upon
payment

payment of the principal; for perhaps there was a reason in equity for the payment of the penalty. 1 Com. Dig. 269, cites, *per three J. Cro. cont.* 1 Rol. 730. l. 35. Cro. Car. 490. Jon. 400.

So any act by him, that will be a *devastavit*, is void. *Id.* cites, *Semb.* 1. And. 117. Cro. Car. 490.

VI. Administration by an Administrator, durante minore ætate.

If an executor be an infant, administration shall be granted to another during his minority. So, if an infant be intitled to the administration, administration shall be granted to another during his minority. *Vide Administrator. Div. II. No. 6.*

But the administration ceases, when the infant executor attains the age of seventeen years. And if there are several executors, when any one attains such age.

Yet where administration is granted during the minority of any one intitled to administration, it does not cease until his age of twenty-one years. *Vide Administrator. Div. II. No. 6.*

An administrator during the minority of any one intitled to administration, has, for the time, all the power and authority of an absolute administrator.

So, if a man appoint an infant his executor, and that another shall have the administration during his nonage; he is executor for the time, and so long has the authority of an absolute administrator or executor. Though he be made by the will administrator, only for the benefit of the infant executor.

So, if administration be granted by the ordinary during the minority of an infant executor generally, the administrator may pay the debts of the testator. And, if he give his bond for a debt of the testator, he may retain of his goods to the value. So, he may sell, or dispose of the goods of the testator, if they are *peritura*. Or for payment of debts. So, he may retain his own debt. So, he may receive debts due to the testator. And discharge, and acquit them.

So, he may maintain *trover* for the goods of the testator; for the property is in him. Or, other actions for debts due to the testator, &c.

So, he may assign a term for years. Or, demise it for a less term.

But

But he is only in nature of a bailiff, and ought to account to the executor. So, if he has administration granted to him specially in *commodum executor*, he cannot make leases of chattels real of the testator.

If the administrator, *durante minore etate* continue in possession of the goods after the executor attains the age of seventeen years, he may be sued by a stranger. And, if he has wasted the goods before the full age of the infant executor, he may afterwards be charged upon the special matter.

So the executor, when probate granted, shall have *detinue* against him, or a suit in the ecclesiastical court for the goods.

But, if an administrator, *durante minore etate*, administer in part, and deliver to the executor at his full age all the residue, he cannot be charged by a stranger. Or, if he deliver to the executor only part, who releases to him the whole. *Per two J. 1 Mod. 174, 5. Semb. Cro. El. 43. 1 Com. Dig. 270, 1.*

Administration granted during the minority of four children, does not determine on the marriage of one of them to a husband of full age. *Per King C. and Raymond, C. J. 3 P. W. 79.*

Administration granted during the minority of an infant executrix under seventeen, does not determine on her marrying an husband of age. *Per King C. and Raymond, C. J. denying Prince's case, 5 Co. 29. to be law, as not mentioned by other reporters of the same case. Ibid.*

Nor, on the death of one of the infants. *Per King C. and Raymond, C. J. contrary to Brudenel's case, 5 Co. Ibid.*

VII. Administration by an Executor, of an Executor.

If the executor prove the will of his testator, and dies, his executor shall administer to the first testator. *Vide Administrator, Div. II. No. 6.*

But, if the executor die intestate, his administrator shall not be executor to the testator. *Vide Id.*

Nor, the executor of another co-executor, who was dead before.

Nor, the executor of the executor, who proved the will, though the other executor who survived, refused.

The executor of an executor, hath the same interest in the goods of the first testator, as the first executor. And shall plead, *plene administravit, &c.* in the same manner. And ought to administer the goods in the same manner.

By

By the *stat. 25 Ed. 3. c. 5.* Executors of executors shall have actions of debts and goods of the first testator, in the same manner as the testator himself; and shall answer to others as the first executor should do.

By the same statute, he shall have execution of the statutes-merchant, and recognizances to the first testator.

If a testator hath a statute merchant certified into *chancery*, and an extent upon it, and before the return of the extent dies, his executor or administrator may sue out a *liberate* upon it without a new certificate or extent.

And the executor of the executor of *B.* may be named directly, executor to *B.*

But before the *stat. 17. Car. 2. c. 8.* If an executor had a judgment for a debt of his testator, and died intestate, the administrator *de bonis non* should not have had a *scire facias* upon this judgment for want of privity, but ought to have had debt *de novo* for the same demand, as administrator to the first testator.

If an administrator had judgment, his executor, or administrator should not have had a *scire facias* upon it.

Otherwise, if the executor, or administrator had judgment, and had sued execution upon it by *elegit*, though the debt was not levied; for thereby the interest was vested in him.

If the executor, or administrator hath judgment for the goods of the testator taken out of his possession, his executor, or administrator shall have a *scire facias* upon it, and account for them to the administrator, *de bonis non*.

And now, by the *stat. 17 Car. 2. c. 8.* made perpetual by the *stat. 1 Jac. 2. c. 17.* an administrator, *de bonis non*, &c. may sue a *scire facias*, and take execution on such judgment after verdict.

And, if execution after judgment upon a verdict be sued, and the money levied, the administrator, *de bonis non*, &c. may have it.

Or, by the equity of this statute, if the sheriff return, remaining in his hands for want of buyers, he may sue a *vend' exponas*, or *dist' nuper vic'*,

So, upon judgment by default, if the administrator sue execution, and die; when the goods are in the hands of the sheriff, the administrator, *de bonis non*, &c. shall have the money brought into court.

So, the executor of an executor shall have escape against the sheriff, for the escape of one in execution, at the suit of the first testator. 1 *Com. Dig.* 271, 2.

So

So now, by the *stat. 8 & 9 W. 3 c. 10.* If plaintiff die after interlocutory, and before final judgment, the action shall not abate, if such action might originally be sued by his executor, or administrator; but the executor, or administrator may have a *scire facias* against the defendant, or, if he die, against his executor, or administrator; and if the defendant, his executor or administrator appear, and shew no cause to arrest the final judgment, or on a *scire feci*, or two *nibils*, make default, a writ of enquiry shall go, and being executed and returned, judgment final shall be given against the defendant, or against his executor, or administrator.

So, if the defendant die after interlocutory, and before final judgment, the plaintiff, or if he die, his executor, or administrator may have a *scire facias* against the executor, or administrator of defendant, &c.

But if the defendant die before final judgment, and a *scire facias* is sued against his executor, or administrator, the judgment in the *scire facias* must be against the executor or administrator and not against the intestate, though the action was commenced against him. *Semb. 1 Salk. 42.*

VIII. Distribution of Intestate's Estate.

When the executor had fully administered, and paid all the legacies and debts of his testator, the surplus, (if there was any,) belonged to himself, though he was not named residuary legatee.

So, an administrator, since the *stat. 21 H. 8. c. 5.* was not compellable to account for the surplus after debts, &c. paid, but had it to himself; for the statute intended him a benefit.

And, if the ordinary had required a bond of him to make account, or distribution of the surplus, a prohibition would go. Or, if he had proceeded to enforce a distribution, though the administrator had agreed to make one. *1 Com. Dig. 272.*

But now by the *stat. 22 & 23 Car. 2. c. 10.* made perpetual by the *stat. 1 Jac. 2. c. 17.* the administrator shall distribute what remains clear of the intestate's goods, after his debts, funeral, and just expences allowed, to his wife, children, or next of kin, *viz.* one third to the wife, and the rest to his children, or, (if any of them be dead,) their legal representatives: any child advanced in the parent's life to the value of the dividend, shall have no share with the other children,

dren, unless the heir: If advanced, but not to the value, he shall have so much as will make his share equal with the other children: And the heir at law shall have an equal share with the rest, though advanced in his father's life, without regard to land by descent, or otherwise.

By the same statute, if there be no children, nor representatives of them, a moiety shall be to the wife, the other moiety equally to his next of kin, in equal degree, and their representatives; provided no representation be among collaterals after brothers, and sisters children,

If no wife, all shall be distributed to the children. If no wife, nor children, all to the next of kin equally.

A brother, or sister of the half blood, shall have an equal share, with those of the whole blood; for they are in equal degree. *Vide* various authorities. 1 *Com. Dig.* 273.

Distribution shall be made to the several stocks, which are in equal degree of kin. And if any be dead, the representative to the remotest degree in a lineal descent, shall be admitted to the share of his parent.

If there be only one son, or daughter, the whole share of the children goes to him, or her.

If there be a grandmother and also an aunt, the whole goes to the grand-mother; for she is nearest.

If three brothers, who are dead, have several issues, the one two, the other three, the other five, all ten take in equal degrees; for they shall take as next of kin; and not in representation to others.

If a son, or daughter die in the life of the father, he shall have all without distribution, for he is next of kin. So, the mother would have had.

But now by the *stat.* 2 *Jac.* 2. *c.* 27. If after the father's death, any child die intestate, without wife, or issue, in the life of the mother, every brother and sister, and their representatives shall have an equal share with the mother.

If he die without issue, having a wife, every brother, and sister shall have an equal share with the mother, of the moiety distributable. 1 *Com. Dig.* 273.

By the *stat.* 29 *Car.* 2. *c.* 3. the statute 22 & 23 *Car.* 2. *c.* 10. does not extend to a *feme covert* intestate; but the husband shall have administration, and her personal estate, as before.—This was doubted before. 2 *Mod.* 20.

The *stat.* 22 & 23 *Car.* 2. *c.* 10. is introductive of a new law, and therefore, shall be strictly expounded in restraint of distribution.

No one shall have a share as representative, except the issues of a brother, or sister to the intestate, and not of an uncle, or aunt.

If a brother of the intestate hath a grandson, and a sister hath a son, or daughter, the grandson shall not have distribution with the son, or daughter of the sister.

Every son advanced by the father in his life-time, except the heir at law, shall put his advancement into *Hotchpot*, before he shall be admitted to a distribution.

So, the heir at law, if he be advanced out of the personal estate. Though his advancement be only, the use of furniture for his life; for it is an advancement *pro tanto*.

So, the younger son, though he takes as heir by *Borough English*, by descent; for he is not properly heir at law.

So, a portion for a daughter, to be raised out of lands at age, or marriage, will be an advancement to the daughter, when she marries, though she was within age, and unmarried at the death of the testator. 1 Com. Dig. 273,4.

By the *stat. 22 & 23 Car. 2. c. 10.* no distribution shall be, 'till one year after intestate's death.

And then the party shall give bond with surety to refund his rateable part towards any debt and charges, which shall be recovered against the administrator, or appear due from the intestate. 1 Com. Dig. 274.

So by the same statute, distribution shall not be, where administration is granted *cum testamento annexo*; for the will shall be pursued.

Yet the next of kin hath an interest vested in him before distribution, and if he die within a year after the intestate, his executor or administrator shall have his share. 1 Com. Dig. 274.

So, if he make a will, and devise his share, it shall go to the devisee.

So, if the next of kin be a *feme covert* and die, and then her husband dies before administration to his wife, it goes to the executor, or administrator of the husband. 1 Com. Dig. 274. cites *Dub. 2 Ver. 302.*

If an administrator refuse to make distribution, he may be compelled to it in *Chancery*.

So any one intitled to distribution may compel him to prove his account, and to be examined upon oath as to it.

So a *mandamus* lies to the spiritual court to make a distribution to him, who has a right, if they do it not. *Semb. 1 Salk. 251. 1 Com. Dig. 274.*

IF

If intestate hath several brothers and sisters, some of the whole and others of the half blood, who all die in his lifetime, all leaving several children, the distribution shall be *per capita*, for they take as next of kin to intestate. If one of intestate's brothers, or sisters survives him, the children of the rest, must take only by representation, *i. e. per stirpes*; and there is no distinction between the whole and the half blood. *Janfon v. Bury*, H. 1723, *Clarkson v. Spateman*, M. 1688. *Wall v. Theedham*, T. 1711. *Bunb.* 157. *Davers v. Dewes*, T. 1730. 3 P. W. 40.

If intestate dies without issue, leaving a wife, brothers, sisters, and mother, the wife takes a moiety, and the mother hath a share of the other moiety in common with the brothers and sisters. *Stra.* 710.

Borough English lands shall be brought into hotchpot, on the statute of distribution. *Per Jekyll*, M. R. *Pratt v. Pratt*, P. 5 Geo. 2. *Stra* 935.

But this decree was reversed by *Talbot C.* who determined that the youngest son should have his full distributive share of his father's personal estate, notwithstanding the descent of lands in *Borough English* to him; and so again in *Lutwyche v. Lutwyche*, P. 8 Geo. 2. *Cases in the time of Talbot*, 276.

A posthumous brother of the half blood shall take under the statute a share of his intestate brother's personal estate. 1 *Vezey* 156.

The grand-daughter of sister, and the daughter of aunt of intestate, are in equal degree, and the distribution shall be equal. 1 *Vezey*, 333.

Debts follow the person of the creditor, not of the debtor; therefore if an Englishman residing and dying here, and administration taken out here, hath debts due to him in *Scotland*, or abroad, they shall be distributed according to the law of *England*. 2 *Vezey*, 35.

IX. *Devastavit.*

1. *What shall be.*

If an executor or administrator sell, imbezil, or convert to his own use the goods of his testator, or intestate, before debts or legacies paid, it will be a *devastavit*. So if he pays that which need not be paid. Or, pay a legacy, or a debt of an inferior nature before another of a superior.

If

If he discount a debt due from the testator to a creditor, out of his own debt.

So, if he dispose of goods at an undervalue. Though they are so appraised. *Off. Ex. 227. Qu. de hoc?* If there is not any fraud.

So, if he accept a note, covenant, &c. in satisfaction of a debt, which is not paid.

So, if he release, or acquit a bond, being forfeited. *Vide post. No. 2.* Or, cancel, or deliver it to the obligor.

So, if he release an action to another, who took the goods of, or did a wrong to the testator, it will be a *devastavit* to the value of the goods, or damages.

So, if he submit a debt due to the testator, &c. to arbitration, and the arbitrators do not make a recompence to the full value, it will be a *devastavit* for the residue. *Off. Ex. 229.*

But as a jury are, by their verdict, to determine, *devastavit vel non*, if the reference was fair, and intended to avoid expences of law, I should not much fear a jury finding a *devastavit*, for the fault of arbitrators.

If he pay a debt upon an usurious contract, it is a *devastavit*. *Per Yel. Noy 129.*

But I conceive it must appear upon the face of the contract, to be usurious, and then the *stat.* renders the contract void.

So, if he agree with the executor *de son tort*, and accept his covenant for payment, it will be a *devastavit* for so much, though nothing be paid.

So, if an executor or administrator hath assets to the amount of 100*l.* and is sued in two actions, and confesses judgment to 100*l.* value in each, he shall be charged with 200*l.* as if he had given bond for so much. So, if he be sued upon bond, and upon simple contract, and suffer judgment in both, without pleading the bond to the action upon simple contract, or the judgment in the action upon simple contract, to the action upon the bond, he shall be charged with both judgments, though he hath assets only for one.

So, if he suffer a judgment for principal and interest incurred since the death of the testator, it will be a *devastavit*, for the interest. *R. 2 Lev. 40.*

Qu. If he had not assets to pay the principal?

A *devastavit* by the husband binds the wife. *Vide ante Div. IV. 1 Com. Dig. 274, 5.*

2. *What not.*

But a receipt for so much due upon a bond as he receives, is not a *devastavit* for the residue. Nor a parol agreement, that he will not sue for the penalty. Nor, a delivery into another's hand, that it may not be sued.

So, disposing of the goods of the testator to his own use, is not a *devastavit*; if he pays debts of the testator to the value, with his own money.

So, if he lose a bond due to the testator; for he hath a remedy for the debt in equity: But he ought to pursue it. *Dub. 2 Ver. 299.*

So, if he compound an action of *trover*, for the goods of the testator, and take a bond for the money to be paid at a future day, it is not a *devastavit*; but the money for which the bond is taken, is assets immediately.

So, a release by an executor of full age, upon payment of principal and interest due upon a forfeited bond, is not a *devastavit*. *Vide ante No. 1.*

So a *devastavit* by one executor does not charge his companion.

So the executor of an executor shall not be charged by a *devastavit* made by the first executor; for it is personal, though it be in the case of the king. *1 Com. Dig. 275.*

If there are arrears of rent on a lease of leasehold premises, and tenant becomes insolvent, and the administrator releases the arrears, and gives him a sum of money to quit possession; if it appears for the benefit of the estate, he shall be allowed both. *3 P. W. 381.*

Three administrators appoint a receiver, each administrator liable only for what he himself receives. *Barner 440.*

3. *Remedy upon a Devastavit.*

If an executor or administrator be guilty of a *devastavit*, and there is afterwards judgment against him for a debt of the testator, or intestate, and upon a *feri facias* thereon, *nulla bona* be returned, a special *scire facias* shall go to the sheriff *quod de bonis testatoris &c. et si constare poterit quod devastavit, tunc de bonis propriis, &c.*

Or, if after *nulla bona* returned, a *testatum* be entered upon the roll *quod devastavit*, a writ of enquiry shall be directed to the sheriff, and if by inquisition the *devastavit* be found, and

and returned, there shall be a *scire facias quare executionem non de propriis bonis*; and if upon that the sheriff return *scire feci*, the executor, or administrator may appear, and traverse the inquisition.

If he appears, and traverses, and it be found against him, the judgment shall be *de bonis propriis*. So, if he appears, and afterwards makes default. So, if upon the *scire facias* the sheriff does not return *scire feci*, but two *nihilis*.

But a *scire facias quare executionem non de bonis propriis*, does not lie, without a *devastavit* returned, or found. And an executor is not injured by this course; for, though he cannot traverse the inquisition, when he does not appear, nor shall have an action against the sheriff for a false return, yet he may be relieved by an *audita querela*.

So the sheriff may return a *devastavit* upon the *feri facias*, but it shall be at his peril; for the inquisition is for his security.

So, after a judgment against an executor, or administrator, the plaintiff may have debt against him, in the *debet* and *detinet*, upon a suggestion of a *devastavit*. Though the judgment be erroneous, till it be reversed.

But he shall not have debt in the *debet* and *detinet*, upon a suggestion of a *devastavit*, where he sues upon the bond of the testator. Nor, shall he have a *scire facias* against an executor, upon a bare suggestion of a *devastavit*.

So debt does not lie against the executor of an executor, upon a *devastavit* by the first executor. 1 Com. Dig. 276.

But this is altered by *stat. 30 Car. 2 stat. 1. c. 7.* and 4 & 5 W. & M. c. 24. § 12. *Vide post. this division.*

Upon a judgment against husband and wife executrix, if she survives, debt does not lie, suggesting a *devastavit* by the husband; for though chargeable for the wasting by the husband, she shall not be charged *de bonis propriis* for costs recovered against the husband.

And by the *stat. 30 Car. 2. c. 7.* made perpetual by the *stat. 4 & 5 W. & M. c. 24. § 12.* Executors, or administrators of any, who as executors *de son tort*, or as administrators, shall waste, or convert to his or their own use, goods or assets of any person deceased, shall be liable in the same manner as their testator, or intestate would have been.

And upon this statute, the executor, or administrator of a rightful executor or administrator, shall be charged upon a *devastavit* of the testator, or intestate, for the word *administrator* comprehends him.

Execution shall be upon a *devastavit*, as for his own proper debt, by *capias ad satisfaciendum*, or *elegit*.

But a debt by *devastavit* shall be only of the nature of a debt by simple contract. And therefore, the executor of him, who was guilty of the *devastavit*, may retain for his debt before payment of the debt due by the *devastavit*. 1 *Com. Dig.* 276, 7.

If a *devastavit* is returned against a *feme covert* executrix, and her husband, that sufficient goods have come to their hands which they have wasted and converted to their own use, it is good; the conversion is not necessary, and may be rejected; and judgment shall be *de bonis propriis* of both. *Stra.* 440.

Executor *de son tort* of executor *de son tort*, is not liable for a *devastavit* committed by the first, either at common law, or by *stat.* 30 *Car.* 2. c. 7. *Andr* 252.

ADMINISTRATOR.

I. Administrator, by the common Law.

Anciently, the care of an intestate's goods seemed to be under the direction of his lord, unless he died in war; but then it was under the direction of the temporal court, where the goods were. And the opinion, 9 *Co.* 38. b. *Hensloe*, that the king had the care of them, is not true. *Vide Seld. Jurisd. of Testaments*, l. 2. c. 1, 2. 5.

In the time of king *John*, the king by *Magna Charta*, 17 *Joh.* granted, *Si liber homo intestatus decesserit, catalla sua per manus propinquorum parentum et amicorum suorum per visum Ecclesie distribuantur.* *Seld. Jurisd. of Test.* l. 2. c. 3, 4.

So, by charter in the time of *R.* 1 *Eq. Ca.* 206.

And upon this foundation, it seems, that the ordinary intermeddled with the goods of an intestate.

Or, it was granted to them by parliament.

Though it be said, that administration belonged originally to the spiritual court.

So the king may grant administration, by letters patent. *Vide* 1 *Salk.* 37.

And where there is not any of kin to the intestate, the king usually appoints one by his patent, to whom the ordinary grants administration.

And the ordinary may commit his authority to another, to take care of the intestate's goods. And might have had trespass for goods taken out of his possession; otherwise

not

not. Or, release such trespass; which would be a bar to an administrator afterwards made.

But the ordinary, or his committee by writ, *ad colligenda bona defuncti* had only the power of an administrator, *durante minore etate*.

What power that is, *Vide Administration, Div. VI.*

And therefore, could only administer, *ad commodum* of the intestate, and not to his prejudice. And could not give goods, or release debts, &c. 2 *Inst.* 398. *cont.* as to the disposition of the goods, but *acc.* as to the release of debts. 1 *Com. Dig.* 277. Various authorities, not worth citing, as the ordinary does not now interfere.

The ordinary could not have an action for the recovery of the goods.

Yet, by the *stat. W. 2. c. 10.* An action will lie against the ordinary for a debt of the intestate, if the goods come to his hands; which is only an affirmance of the common law. So, every action, which will lie against an executor. And, against the executor of the ordinary, if the goods of the intestate come to his hands. So, against the committee of the ordinary.

Yet, the ordinary shall not be charged beyond the assets which come to his hands. And for so much he shall be charged, if he retains them in his hands, though he grants administration to another. 1 *Com. Dig.* 277, 8.

II. Since the Statute. 31 Ed. 3. c. 11.

1. When Administration shall be granted.

Now by the *stat. 31 Ed. 3. c. 11*, where a man dies intestate, the ordinary shall depute the next and most lawful friends of the deceased to administer his goods, who shall have an action to demand and recover, as executors, his debts, to dispend for his soul, and shall answer in the king's courts to others, &c. and be accountable, as executors.

And therefore, in all cases, where a man dies intestate, the ordinary ought to grant administration. And he is compellable to do it. And if he refuses, a *mandamus* shall be granted.

So, if a man make a will, and all the executors refuse. Or, make his will, but do not name any executor. So, if one

one executor proves the will, and dies, and then the other refuses.

So, if a man name the executor of *B.* to be his executor, and die in the life-time of *B.* for until *B.*'s death, the testator is in effect intestate.

Or, name an executor, to have authority after a year, from his death; for during the year, he is without an executor.

So, if he name an executor, who dies intestate, the ordinary ought to grant administration, *de bonis non*, &c.

If the executor of the king refuse, administration shall be granted, *cum testamento annexo*.

So, if an executor be within the age of seventeen years, administration shall be granted during his minority, viz. until his age of seventeen years. *Vide Administration, Div. VI.*

So, if a person, intitled to administration, be within age, it may be granted to another, during his minority. *Vide post. No. 6.*

So, if he be out of the kingdom, it may be granted, during his absence. So, if it be contested, who shall be executor, it may be granted, *pendente lite*. *Vide Hob. 250. 2 Jon. 134. per three J. F. g. 260. Vide infra, cont.*

If the executor be an idiot, *non compos*, or under other natural disability.

If the executor writes to the judge of the spiritual court, that he cannot attend the executorship, and desires he will grant administration to another, it will be a renunciation, and he cannot afterwards administer, for there is no form requisite to a refusal.

But if a man make a will, and an executor, administration granted before probate, or refusal, is void, if the will be afterwards proved; though it was concealed and not known at the time of administration granted. *Vide Administration, Div. II. No. 4.*

So administration granted before a refusal, is void; though the executor afterwards refuse. Or granted when the executor becomes a bankrupt. So, though it be doubted, who is the true executor, administration granted in the meantime, is void. *Mo. 636. cont. Semb. supra.*

So, if one executor prove the will, and the other refuse, and he who proved it, dies, administration shall not be granted during the life of the other. *R. Hard. 111. Dub. Dy. 160. b. Without a new refusal. 1 Salk. 307. 311. 1 Com. Dig. 278, 9.*

2. *By whom it shall be granted.*

By the *stat. 31 Ed. 3. c. 11.* The ordinary deposes the next and most lawful friends to administer. And within this statute, the king may grant administration, as supreme ordinary.

The bishop, or metropolitan. *Vide post. No. 3. 5.* So, the guardians of the spiritualties. The commissary, arch-deacon, or other ecclesiastical judge, is ordinary within this statute.

But the delegates cannot grant administration, for their authority is only, *corrigere.*

Yet, if the delegates repeal an administration granted by an inferior judge, who is thereby disabled to grant administration, *de novo*, then the delegates may grant it. *Semb. Lat. 85. 2 Rol. 233. l. 13.*

The ordinary hath no more power since the *stat. 31. Ed. 3. c. 11.* than before, except to grant administration to those who have greater authority than himself. And therefore, since the statute, he cannot have an action for a debt, &c. to the intestate. *1 Com. Dig. 279.*

3. *When by the Metropolitan.*

If an intestate die, having *bona notabilia* in several dioceses, administration shall be granted by the archbishop of the province. So, if he hath *bona notabilia* in several dioceses of the same province, though he hath not goods in the diocese in which he dies. Or, in several peculiars within the same province.

So, if a man die intestate out of the kingdom, the archbishop shall grant administration.

So, if the king die intestate, or his executors refuse.

So, if a bishop die intestate, though he hath not any goods out of his diocese.

So, if administration by an inferior judge be repealed upon appeal, the court which repeals it, shall grant administration, *de novo.*

But, if a man die intestate, having *bona notabilia* in the several provinces, administration shall be granted by each archbishop, for the goods in his province.

If he hath *bona notabilia* in Ireland, and also in England, it shall be granted by the archbishop of Dublin, for the goods

in

In *Ireland*, and by the archbishop of *Canterbury* for the goods in his province.

So, if a man die intestate, having goods in a peculiar, and also in a diocese in the same province, administration shall not be granted by the archbishop, but by the bishop for the goods in his diocese, and by the judge of the peculiar for the goods there. *Vide Administration, Div. II. No. 6.*

Yet, if the metropolitan grant administration, when it does not belong to him, it is not void; but only voidable. Otherwise, if he grant administration for goods in another province; for that is void.

But, after an administration by the archbishop, if the bishop, to whom it belongs, grant administration, and then the first administration is repealed, the administration granted before the repeal stands good.

So, in all cases, where the first administration is repealed, the second stands good, though granted after the grant of the first, and before the repeal of it. *1 Com. Dig. 279, 80.*

4. *What are Bona Notabilia.*

Bona Notabilia were not, originally, of any certain value; for, if a man had to the value of 40s. or a less value in several dioceses, that gave a prerogative to the archbishop. But, in pleading it was necessary to say, that he had *bona notabilia* to such a value; for it was not sufficient to say, that he had *bona notabilia* generally. And therefore, it was usual to alledge, that he had *bona notabilia*, viz. to the value of 5l. which seems to ascertain them to such a value. And sometimes they were alledged to the value of 8l. or other certain value.

And now, by the canon *1 Jac. 93.* *Bona notabilia* shall be 5l. at least, except where by custom, or prescription they are more. And hereupon our law in this particular conforms itself to the canon. And *bona notabilia* shall be to the value of 5l. at least in every diocese.

And by custom in the diocese of *London*, to the value of 10l. by composition.

But the penalty of a bond shall not be estimated, though the bond be forfeited, if the debt upon it be not 5l.

If a man hath goods to the value of 5l. in one diocese, and a term for years of the same value in another, that makes *bona notabilia*, though by the old book of entries, they are called *bona mobilia*. So, if he hath bonds in another diocese. So, debts due from the king, Or, desperate debts.

And

And bonds shall be reputed to be goods, in the diocese where they remain at the death of the intestate, not where they were made, or where the obligee died.

An annuity out of a parsonage in the diocese where the parsonage lies.

Judgments, statutes, or recognizances, in the place where they are given or acknowledged.

Debts upon simple contract, where the debtor lives.

Leases for years, where the land lies, and not where the lease is.

But, by the canon 1 *Jac.* 92. Goods which a man hath with him, who dies *in itinere*, do not make *bona notabilia*.

Nor, by the *stat.* 4 *Ann. c.* 16. Salary, wages, or pay due to any for work in any of her majesty's yards, or docks. 1 *Com. Dig.* 280, 1.

5. *When by an inferior Judge.*

If an intestate hath not *bona notabilia*, administration shall be granted by the bishop of the diocese, where he dies. Or, if he dies within a peculiar, by the judge of the peculiar jurisdiction.

So, if he hath several dwelling places, and dies at one of them, administration shall be granted by the bishop of that diocese, though he lives at the other for the most part, and was here only for a day or two.

Otherwise, if he dies in a journey, &c.

And a bishop may grant administration out of his diocese; for it is only ministerial.

So a bishop of *Ireland*, being in *England*, may grant administration here, for goods in *Ireland*.

So, an archbishop may grant it, though he be out of his province.

But, if administration be granted by a bishop, or other inferior judge, when it does not belong to him, it is null and void. And, in an action by an administrator, to whom administration was granted by a judge of a peculiar, &c. when it did not belong to him, it is a good bar, that no administration was granted.

So, in a *scire facias* by him upon a judgment in *B. R.* or *C. B.* he shall not have judgment; for the administration does not extend to a matter, that appears to be out of the jurisdiction of the ordinary, and the court will not intend any other title, but that which the plaintiff shews.

So,

So, if a defendant in execution upon such a judgment escape, such an administrator shall not have an action against the sheriff for the escape. 1 Com. Dig. 281.

6. To whom it shall be granted.

By the *stat.* 31 *Ed.* 3. c. 11. The ordinary must depute the next and most lawful friends of the intestate to administer.

By the *stat.* 21 *H.* 8. c. 5. The ordinary may commit administration to the wife, or next of kin to the intestate, or to both. And therefore, administration may be granted to the wife of the intestate; or part to her, and part to the next of kin. Or, to the father, or other next of kin, and not to the wife.

Who are next of kin: *Vide Administration, Div. VIII.*

If there are several in the same degree of kin, the ordinary may grant administration to all, or to which he pleases. *Vide st.* 21 *H.* 8. c. 5.

And, if the administration be only for a limited time, until the time at which an executor is appointed, it ought to be to the next of kin. And therefore, the ordinary may grant administration to the sister of the half-blood; for she is in equal degree of kin with the brother of the whole blood. *Vide Administration, Div. VIII.*

To the grandfather, or uncle; though the grandfather seems to be preferable.

And, if it be granted to one not next of kin, it is not void but voidable.

But, if a *feme covert* die intestate, administration shall be granted to the husband, *de jure*; and the ordinary hath not any election to grant it to him, or to another.

If a father die, it shall be granted to his son, before the grandfather, though in equal degree.

If a *feme covert* refuse, it shall be granted to her husband.

So, if the next of kin be incapable, administration shall be granted to another: As, if he be an idiot. If he become bankrupt. So, if the next of kin be an infant, administration may be granted, during his minority. *Vide Administration, Div. VI.*

And administration, *durante minore etate*, of another need not be granted to the next of kin, for it is not within the *stat.* 21 *H.* 8. c. 5.

And,

And, though an administration during the minority of an executor, ceases at his age of seventeen years, (*Vide Administration. Div. VI.*) an administration during the minority of one intitled to administration, does not cease until his age of twenty-one years

But it is not an incapacity to be an administrator, if the next of kin be an *alien*. Or, a *feme covert*.

So, if the next of kin refuse, administration shall be granted to a principal creditor. Yet, if granted to a creditor without a refusal, the next of kin may afterwards repeal it.

Administration *de bonis non* shall be granted to the next of kin, if there be a residuary legatee. And, if there are several intitled to the residue, it may be granted to any of them. And, if granted to the next of kin, shall be repealed by the residuary legatee. 2 *Lev.* 56. Though there be no residue at present. *Dub.* 2 *Lev.* 56.

If an executor prove the will, and afterwards make his executor, and die, his executor shall be executor to the first testator. *Vide Administration, Div. VII.*

So, if an executor after probate die intestate, being also residuary legatee, administration to the testator shall be granted to the administrator of the executor.

So, if an executor be residuary legatee, administration *de bonis non* to the first testator shall be granted to his executor, though he refused, or died before probate.

But the executor of an executor may refuse to have administration to the first testator. And the administrator of an executor, who was not residuary legatee, shall not have administration to the testator. Nor, an administrator during the minority of the executor of an executor.

Nor, an administrator of an administrator. *Qu. Dy.* 112. *b. R. 1 Rol.* 907. *l.* 30. *D. 1 Sid.* 79.

Nor, an executor of an administrator. *Qu. Dy.* 47. *b. D. 1 Rol.* 907. *l.* 42. *Semb.* 5 *Co.* 9. *b. Vide* 2 *Lev.* 100.

Yet, since the *stat.* 22 & 23 *Car.* 2. *c.* 10. The interest is vested in the next of kin; and therefore, if he die before distribution, his executor, or administrator seems intitled to the administration, *de bonis non.* 1 *Com. Dig.* 282. 3.

If by articles before marriage, the wife hath power to make a will, and to dispose of her leasehold estate; and she makes her will, and *A.* executor who proves it; yet the husband shall have administration, though the will controul the administration as to the leasehold estate, and a peremptory *mandamus* shall go. *Stra.* 891.

The spiritual court is not obliged to grant administration, *durante minore etate*, of an executor, to his father. *Stra.* 892.

Nor, to a residuary legatee, with the will annexed. *Stra.* 956.

If a husband hath departed from all interest in the wife's fortune, he shall not have administration. *Stra.* 1111.

Unless the husband hath done some act to exclude himself, he shall have administration, though the wife had a separate estate, and had made a will.

If the widow renounces administration, she is not obliged to make oath that none of intestate's effects are come to her hands, or to exhibit an inventory, and notwithstanding she refuses it, and the creditors enter a *caveat*, administration shall be granted to the son. *Lord Suffolk's Case. Rep. temp. Hardw. 9.*

If administration be granted to two, and one dies, the administration survives. *Ca. temp. Talb. 127.*

7. How it shall be granted.

Administration must be granted in writing under seal, and not by *parol*. It may be granted to two, and if one dies, the survivor shall be sole administrator. So it may be granted upon condition, or until the return of such an one.

So, several administrations may be granted; for goods of the intestate in such a county or place to one, and for goods in such a place to another.

If there be a doubt to whom administration ought to be granted, it may be granted *pendente lite*.

But if administration be granted *omnium bonorum et creditorum concernen' testamentum A.* that will be a general administration, though only some particulars are mentioned in the will.

The ordinary cannot grant administration for some part of a debt to one, and for the residue to another. Nor, *pendente lite*, where the will is disputed. *R. Carth. 153. But Vide post. this Div.*

If the ordinary does not grant administration to him, who ought to have it, a prohibition, or *mandamus* shall be granted. *1 Com. Dig. 283.*

It may be granted *pendente lite* about a will (notwithstanding *Carth. 153* which was never adjudged) and such administrator

nistrator may bring actions. Judgment in *C. B.* affirmed in *B. R. Woollaston v. Walker*, *M. 5 Geo. 2. Stra.* 917.

The spiritual court may take a bond for due administration, even where it is *cum testamento annexo*. *Stra.* 1137.

8. *When it may be repealed.*

If administration be regularly granted to the next of kin, the ordinary cannot revoke it without cause, and grant it to another; for he hath executed his authority. Though there be a male administration afterwards; for he ought to take sufficient caution against it. Though it was granted after a *caveat* entered. And if there be a suit in the spiritual court to repeal it, a prohibition shall go.

But if administration be granted *non vocatis jure vocandis*, it may be repealed. So, if it be granted by a bishop when there are *bona notabilia*. Or, by the archbishop when there are not. So, if it be granted to the next of kin of a wife, and not to her husband. So if it be granted to one not next of kin. Or, to the next of kin, when another was residuary legatee. Though there be not then any residue; for there may be afterwards. *Dub. 2 Lev.* 56. *1 Vent.* 218.

So, if the next of kin become an idiot, or otherwise incapable. Or, if it was granted to another in respect of such incapacity which is afterwards removed.

So, if it be granted to any one of kin with another not of kin; as to a sister and her husband; for he continues administrator after the death of his wife.

So, if it be granted upon refusal of an executor, who had before administered.

Yet if an administration be repealed, *quia improvide*, it may be granted to the same person. *1 Com. Dig.* 284.

If intestate leaves a wife, and his sister obtain administration upon the common oath, that he left none, &c. it may be revoked. *Stra.* 911.

9. *What Acts, before Repeal of an Administration are good.*

If administration be regularly granted, and afterwards for cause repealed, all lawful acts by the first administrator remain good.

So, if administration be regularly granted to him, to whom it does not belong, and afterwards repealed, upon a citation;

tion; all acts by the first administrator are good; as if he give the goods of the intestate to another, though the gift was with an intent to defeat the second administrator; for it stands good against him, though by the *stat. 13 Eliz. c. 5.* it was void as to a creditor. And, made *pendente lite* the citation.

If administration to a creditor be repealed by the next of kin, the creditor shall retain. *Vide post. 10.*

So if an administrator assign a term, and upon a citation to repeal the administration it is confirmed, but upon an appeal from this sentence it is repealed, the assignment is good. *1 Com. Dig. 284.*

10. *What not.*

But if administration granted, be repealed upon an appeal, all acts are avoided; for the appeal suspends the sentence. *R. 6 Co. 18. b. Qu.?*

And if the administrator had obtained judgment for a debt of the intestate before the repeal, the defendant shall avoid it by *audita querela*. If he had judgment and execution against the debtor, it will be no bar in an action afterwards against the same debtor by the lawful administrator.

So if administration be granted upon the concealment of a will, and afterwards the will appears, all mesne acts by the administrator are void. Though the executor refuse, and do not prove the will when it is produced; for the administration was void, and cannot be of effect by the refusal of the executor afterwards.

So, if the executor do not prove the will, whereby administration is granted to a debtor, if he afterwards prove it, he may sue the administrator for the debt. *Vide 1 Leo. 90.*

So, if after administration granted, a new administration be obtained by fraud without a repeal of the first, and the second administrator release, and then his administration be repealed, the release shall be void. *1 Com. Dig. 284, 5.*

III. *Executor de son tort.*

1. *Who shall be.*

If a man intermeddle with the goods of the intestate, without taking administration, he will be an executor *de son tort*,

as,

as, if he use, or sell the goods of the intestate. If he pay debts. If he receive a debt due to the intestate, and give an acquittance for it. If he cancel a bond, in which the intestate was bound to another, and give his own bond for the same sum.

If he distribute of the goods of the intestate to the poor. If he milk the cows of the intestate. If he take the goods of the intestate to dispose of at his pleasure. Or, for his own debt.

If he sue, or answer to a suit, as executor.

So, if he takes the goods of the deceased into his possession; that makes him executor *de son tort*, when there is not any other executor, or administrator.

If he take only a dog of the intestate. Or, any part of his goods.

So, if a man hath some colour to intermeddle with the goods of an intestate, but exceeds his authority, that makes him executor *de son tort*; as, if a man who hath letters *ad colligenda bona*, sell goods not perishing. If a wife, for her *paraphernalia*, take more than is convenient for her degree.

So by the *stat. 43 Eliz. c. 8.* If administration by fraud be granted to a person insolvent, &c. who gives goods to *B.* or releases a debt from him to the intestate, *B.* for so much, shall be executor *de son tort*.

So an husband who hath goods given to his wife by covin, shall be charged as executor *de son tort*. Or, if an husband, after the death of his wife, executrix, hath goods, which she, being sole, made a gift of by covin.

So, if a man intermeddle with the goods of an intestate claiming as executor, he may be charged as executor *de son tort*, though another be executor who proves the will. As, if he pay debts, or legacies, or receive debts, &c.

So if a man intermeddle, and afterwards another takes administration, he may be sued as executor *de son tort*. So if he himself takes administration, he may afterwards be sued as administrator or as executor *de son tort*; for the goods which he administered before.

So an executor *de son tort* may be sued, though he delivers the goods to him who afterwards takes administration, *R. Cro. El. 565. cont.* where the administrator has administered to the value of those goods. *Vide post. No. 3. cont.* where he delivers the goods to the lawful administrator before the action; for then he may plead *plene administravit. Per Holt. 1 Salk. 313. 1 Com. Dig. 285, 6.*

2. Who

2. *Who not.*

But if a man put an horse of the intestate into his stable, that does not make him executor *de son tort*. If he pay the funerals, or debts of the intestate, with his own money. If he give, or sell the goods of the intestate to *A.* that does not make *A.* executor *de son tort*. *Dub. Win. Ent.* 341.

So, if the owner of the house, where the intestate died, lock up his goods, until he can be discharged from them.

So, if he intermeddle only about the funeral.

Or, claim a property in the goods; as, by gift of the intestate, or as *paraphernalia*, &c. or, by writ *ad colligenda bona*.

Yet in these cases the defendant must shew the special matter.

So, if a man take goods out of the possession of the lawful executor or administrator, it does not make him executor *de son tort*. Or, do not take them out of their possession, if they have administered to the full value. *Vide post. No. 3.*

Or, if the administration was granted before his intermeddling. *1 Com. Dig.* 286.

3. *How he shall be charged.*

If a man administer as executor *de son tort*, he is liable to the action of the lawful executor, or administrator. Or, the action of a creditor. And shall be charged as executor generally, in the writ, and count.

And if there be also a lawful executor, they may be joined in the suit, or sued severally. *Off. Ex.* 255. *Qu.* as to suing them severally, for one and the same debt, or demand?

Otherwise, if there be a lawful administrator; for he cannot be joined in a suit with an executor *de son tort*. *Off. Ex.* 255.

So, if a creditor take administration, he may maintain debt, &c. for his money against him, who before his administration was executor *de son tort*, as well as trespass, or *trover* for his goods.

If an executor *de son tort* plead, *ne unques executor*, and it be found against him, he shall be charged generally, as another executor (pleading such plea,) with the whole debt *de bonis propriis*.

If

If he plead *plene administravit*, he shall be charged beyond the assets, which came to his hands. And therefore, he shall be allowed, if he pay debts to creditors. If he pay debts with his own money, he may retain goods of the intestate in his hands to the same value.

So, if administration be granted, and the administrator administers to the value of the goods, which the executor *de son tort* took before administration granted, the executor *de son tort* upon *plene administravit* shall be excused. *R. Cro. Car. 88.*

If an executor *de son tort* takes administration, all acts done by him, before, are good by relation.

If *A.* disposes of the goods to *B.* for payment of funeral charges, and afterwards takes administration, he shall not have *trover* against *B.* for the goods.

If an executor *de son tort* take a term for years of the intestate, he shall be chargeable for waste, and for the rent. And upon a judgment against him, the term shall be taken upon a *fiery facias*.

But of a term for years of a reversion he cannot be possessed, and a sale by him will be void.

An executor *de son tort* cannot retain for his own debt. Yet if he afterwards takes administration, he may shew it, and then retain for his own debt. Though he take administration *pendente lite*.

By the *stat. 43 El. c. 8.* An executor *de son tort* by gift, &c, of an administrator, who had administration by covin, may retain for his own debt.

The executor of an executor *de son tort*, shall not be charged by the common law, but only in equity. *1 Com. Dig. 286, 7.*

A court of equity will not decree against an executor *de son tort*, without setting up an administrator. *Bunb. 6.*

If an action is brought against *A.* as executor, who pleads a retainer, and no assets *ultra*; and plaintiff replies, executor *de son tort*; *A.* rejoins, administration granted *puis darrein continuance*; both pleas are consistent and good. *Andr. 328.*

But this is a very prolix method of pleading; the usual mode now is, if the defendant can get administration before the cause is tried, to plead *plene administravit*, produce the of administration, and prove his debt.

Proceeding and Pleading in Actions, by and against an administrator, (or Executor.)

1. *In an Action by an Executor.*

In an action by an executor for a thing, which he demands in right of his testator, he ought to name himself executor, otherwise the defendant may plead in abatement. And it is not sufficient to name him executor in the *alias dictus*.

If there are several executors all must join in the action. Though some do not prove the will, but refuse before the ordinary. Though one be within age. Though the executor, who proves the will, takes administration during the minority of the executor, who is within age, and not joined in the probate of the will.

In all actions by an executor (as executor) the writ must be in the *detinet* only, though the duty accrued in his own time. As, if an executor brings debt against a lessee for rent incurred after his testator's death. Or for an escape on a recovery by himself as executor. Or for money due on a sale by him of the goods of the testator. So in all cases where the money recovered is *affects*, it may be in the *detinet*.

Yet, in an action upon his own contract, it may be in the *debet* and *detinet*, though he is named executor. As, in debt for rent on his own lease of land, which he had as executor.

In debt on the *stat. Ed. 6.* for not setting out tythes, where he had the rectory as executor.

And, if the action be in the *debet* and *detinet*, where it should be in the *detinet* only, or *e contra*, it is substance. But now, it is aided after verdict by the *stat. 16 & 17 Car. 2. c. 8.* And by the *stat. 4 & 5 Ann. c. 16.* On a general demurrer.

So, if the plaintiff omits *profert in Cur.* of the letters testamentary, it is bad, on a special demurrer. Though it be on a *scire facias* upon a judgment by the testator.

But, in an action by an executor, for an escape out of execution, on a judgment by him, as executor, he need not; for this is a *tort* to him, though the damages recovered are *affects*.

If the plaintiff names himself executor or administrator, when the suit is in his own right, it will be but surplufage. 5 Com. Dig. 173, 4. 1 Vent. 119.

In a *scire fieri* inquiry, on a judgment recovered by an executor, it is not necessary that it be alledged, that the testator is dead. Stra. 631.

If the executor of the surviving executor do not shew that the first executors proved the will, it is bad; but it is aided after verdict. Stra. 716. Ld Raym. 1441.

If executor brings action of debt in the *debet* and *detinet*, instead of *debet* only, it is aided after judgment by confession. By stat. 4 Ann. c. 16. Ld. Raym. 1513.

An executor cannot add a count in his own right. Stra. 1271. 1 Wils. 171.

2. In an Action against an Executor

In an action against an executor, as an executor, he must be named executor. Th. D. l. 6. c. 11.

Or, must be shewn to be an executor, for, if the declaration shews the defendant to be executor, though it does not name him executor in the beginning, it is sufficient. Semb. 1 Sand. 112.

If the defendant be executor, *de son tort*, he shall be named an executor generally; for there is no other form of writ or count. R. 5 Co. 31. a.

If an action be against several executors, and only one appears, the plaintiff may proceed and have judgment against all. R. 1 Salk. 312.

In an action against an executor, for a mere personal thing, as executor, the writ shall be in the *detinet* only. 1 Bulst. 22. Reg. 139. b. So, an action against an executor for rent due, part in the life of the testator, part in his own time, may be in the *detinet* only. R. Al. 76.

So, debt for rent in the *debet* and *detinet*, when the rent is more than the value of the land, is bad; for, if this appears upon the plea, it ought to be in the *detinet* only. R. Pol. 133. But, if the duty accrues in the time of the executor, it shall be in the *debet* and *detinet*. Vide 5 Com. Dig. 174. Various authorities.

Yet, it may be in the *detinet* only.

So, if the action be against an executor, on a judgment *de bonis propriis*, it shall in the *debet* and *detinet*. So, in debt

debt against an executor, upon a suggestion of a *devastavit*.

The plaintiff cannot have an action in *detinet* for part, and in *debet* and *detinet* for the residue.

In an action against an executor, the plaintiff need not alledge *assets*, for it shall be intended.

So, if it be against an executor of an heir, on a bond of his ancestor. 5 Com. Dig. 174.

In *B. R.* calling defendant executor in the declaration, is sufficient, without a special averment. *Str.* 781. *L. Ray.* 1510.

In debt on bond, the plaintiff must aver, that it is not paid by the testator's heirs, or that it is still due. *L. Ray.* 1546.

3. Pleas to an Action by an Executor.

If an action be brought by an executor, the defendant may plead in abatement, that the plaintiff is not executor. Or, another executor not named.

So defendant may plead in bar, that she had the goods as wife, for *cloathing*, and that there are *assets ultra*. 5 Com. Dig. 174.

That *A.* administered before probate, and gave or sold the goods to him. *Duh. Carth.* 104. And I doubt if this is a good plea.

4. To an Action against an Executor.

In Abatement, Administrator, not Executor.

If an action is brought against one as executor, he may plead in abatement, that he is administrator, and not executor. In such plea, he must shew, that administration was well granted to him. And therefore, if the archbishop granted it, he must shew in what dioceses the intestate had *bona notabilia*, whereby it may appear that it was in his province.

But this is no plea for an executor of his own wrong, though he afterwards takes administration.

So, he shall shew in what diocese the intestate died. And at what time administration was granted. And that he had *bona notabilia* to such value; for to say generally, is not sufficient.

So,

So, he shall shew that the archbishop had authority to grant, for that there were *bona notabilia*, &c. Or that the bishop had good authority.

But the defendant need not traverse, *absque hoc*, that he administered as executor, for this more proper from the other side.

Otherwise, if he is sued as administrator, and pleads, that he is executor to *A.* and not administrator, he must traverse *absque hoc*, that *A.* died intestate. In an action against one as executor, if he pleads he is not executor, but administrator, he need not produce the letters of administration. *Lut.* 10.

5. Administration to a Stranger, and not to him.

So the defendant may plead, that administration was committed to a stranger, and not to him. *5 Com. Dig.* 175.

6. Another Executor not named.

So, he may plead in abatement, another executor not named.

But he cannot plead another action against himself as heir. *R. 3. Lev.* 304.

7. In Bar.

Ne unques Executor, &c.

So, to an action against one as executor, he may plead in bar, *ne unques executor*.

That he renounced, and that *no goods came to his hands*.

But an executor, who proves the will, though he does not otherwise administer, cannot plead *ne unques executor*.

So, if there are two executors, and the one proves it in the name of both against the will of the other; yet he cannot plead *ne unques executor*, nor administered as executor. *5 Com. Dig.* 175. cites *R. cont.* 27 *H.* 8. 11. a.

So, an administrator shall not plead, that the intestate was outlawed. *R. Hut.* 53.

If a man is administrator he cannot safely plead *ne unques executor*, though it was anciently done. *5 Mod.* 145. *R.* 1 *Salk.* 296.

If

If another be administrator, *durante minore atate* of an executor, to whom the defendant hath accounted, he cannot plead that fact, with a traverse that he never administered *alio modo*; for the plea does not admit him ever chargeable as executor. *R. Sav. 121. 5 Com. Dig. 175.*

To a plea of *ne unques executor*, the plaintiff may reply, that the defendant hath administered. *Win. Ent. 341.*

The replication generally is, that *the defendant administered divers goods and chattels, of &c. as executor, &c.* and this is founded on the words of the plea, which are, *that he never was executor, &c. nor ever administered any goods or chattels, of, &c. as such.*

1. *Non est Factum. Non Assumpsit.*

So an executor may plead in bar, the same bar that his testator might have pleaded: As, *Non est factum testator. Non assumpsit testator, &c.* And if he says, *Non est factum suum*, it is good; for *suum* refers to the testator. *R. after verdict. Lat. 125.*

So, *non assumpsit* generally is good; for it shall be referred to the testator. *R. 1 Lev. 184. 1 Sid. 292.*

9. *Plene Administavit.*

So, an executor may plead in bar, *plene administavit.*

But, this is no plea if he is sued in the *debet* and *detinet*. Otherwise, if sued as executor, though chargeable in another manner. *Dub. 1 Salk. 317.*

He may plead a special *plene administavit*, viz. a judgment, statute, specialty, or retainer, and no assets *ultra*. *5 Com. Dig. 176.*

As to retainer, if his own debt be of an equal, or superior degree, to that demanded, he may give it in evidence, under the plea of *plene administavit.*

He may plead a judgment upon a simple contract. So a judgment against one only, where there are several executors. So a judgment against himself as administrator; for he need not plead in abatement, if it was a just debt. So, a specialty before the day of payment. So judgment confessed by him to a creditor upon suit, after the present action commenced. *5 Com. Dig. 176.*

But

But an executor *de son tort* shall not plead payment of debts, though he may give it in evidence upon *plene administravit*. *Per Holt. Carth. 104.*

If an executor hath a term for years of less value than the rent, and he is sued for the rent in the *debet* and *detinet*, he may plead that he has no *assets*, and that the land is of value, and pray judgment if he shall be charged, except in the *detinet*. 1 *Salk.* 297, 317.

If an executor pleads *plene administravit*, the plaintiff may pray execution of *assets*, *cum acciderint*. 5 *Com. Dig.* 176.

If he pleads *plene administravit prater* so much, which exceeds the demand in the declaration, the plaintiff shall take judgment by confession. *R. Yelv.* 138. Or, reply *assets*, or *assets ultra*, &c. And he must alledge the *Venue*, where the *assets* are.

The plaintiff may reply, that the statute, &c. is burnt. That it was for performance of covenants, which are not broken. Or, that the judgment, &c. was obtained or continued by fraud.

That the statute was extended, and a *liberate* sued and accepted. And he may by *replication* answer to one only, or to every judgment pleaded. Or, say that only so much is due on all the judgments, and he has *assets ultra*. Or, that he paid so much on one judgment, and so much on the other, and the judgments are continued by fraud, though he speaks of them jointly.

Yet a *rejoinder*, that the judgments are not continued by fraud, is bad; for it ought to say, *that they, any, or either of them, &c.*

The defendant in his *rejoinder* must not traverse the inducement, but the fraud.

The plaintiff may reply, that he brought another action, which abated, and he sues now by *Journeys Accompts*, and that the defendant had *assets* at the time of the first original sued. To which the defendant ought to *rejoin no assets at the day of the first original*.

If the plaintiff replies, that the judgment was by fraud, he may rely upon the fraud generally, or traverse the special matter. So the plaintiff may say, that the judgment was given after the testator's death, and continued by fraud, for such judgment is void. 2 *Sand.* 50.

So the plaintiff may conclude his *replication*, and so by *fraud*, or rely on the special fact, which is fraud. 5 *Com. Dig.* 176, 7.

In what order debts are to be paid. *Vide Administration, Dico. III. No. 2.*

If the plea of *plene administravit* is, that the defendant hath not any goods, without more, it is bad. Or, that *plene administravit*, omitting, and that he hath no goods, &c. Or, that he hath no goods, nor on the day of suing forth the writ, &c. without saying, nor ever afterwards, it is bad. *R. on demurrer. 2 Cro. 132.*

If he pleads a judgment against the intestate upon a *scire facias* against himself, upon the *Stat. 8 & 9. W. 3. c. 11.* it will be bad; for the judgment ought to be against the executor, or administrator himself, and so it must be pleaded. *R. 1 Salk. 42.*

But, that he hath no goods, which were of the testator, at the time of his death, is good; for it shall not be intended that goods are come to him, which the testator had not at his death, and if it be so, it shall be shewn on the other side. *5 Com. Dig. 177.* [The plea must in other respects, be in the usual form.]

And, that he had no goods when he first had notice of the plaintiff's Tuits, is sufficient. *Ibid.* [The last observation applies here.]

If the defendant pleads a judgment, he must shew in what court, and when obtained. If several judgments, and one is not well pleaded, it will be bad on a general demurrer.

If an executor or administrator suffers judgment by default, he admits assets. So, if he does not plead *plene administravit*. Though the judgment be against him, *pendente lite*. If he pleads twenty judgments, he admits assets for all. *R. 1 Salk 312.*

If he pleads a judgment for 1700l. for principal and interest, and that he hath only 40l. if the judgment as to interest be bad, the plaintiff shall have judgment; for assets shall be intended for the residue, is not being expressly averred to the contrary. *R. 2 Lev. 40.*

So, If the defendant pleads no assets, *ultra*, &c. it is not well to say, that he has no assets, besides goods which are not sufficient to satisfy the judgments, statutes, &c. pleaded: for no issue can be joined upon such uncertainty. Or, that he has no assets *ultra* what will satisfy. So, if he says, that he has no goods besides goods to the value, and after says, that he has no other goods, besides goods which are not sufficient; for this is repugnant.

But

But he ought to say, that he has not assets, besides so much, (naming the sum certain) which is liable to the judgment, &c. 5 Com. Dig. 178.

This is certainly the true form of pleading, but though a sum certain is named as the value, the pleader seldom, if ever, puts the true value, for no question can arise upon that, but upon the amount of assets, whether they are more than sufficient to satisfy the judgments, &c. pleaded.

He may say, *besides goods sufficient to satisfy the judgments, &c.* for this imports, that he has sufficient for all the judgments, &c. pleaded.

But then, if the plaintiff replies that one of the judgments is satisfied, and the defendant demurs, it will be against the defendant, for his plea is falsified.

So, *no assets besides goods to the value of the money requisite, to satisfy the judgments, &c.* is good, though one of the judgments be discharged. And *no assets besides goods not amounting to 5l.* When the judgment was for 100l. held good on a general demurrer. And *besides goods which do not amount unto, or are not sufficient, &c.* is form only.

In *plene administravit*, if the defendant alleges a judgment, he need not shew that it was for a just debt. So, if he alleges a statute acknowledged, he need not shew that it was for a true and just debt; for it may be for performance of covenants. 5 Com. Dig. 178. cites R. 2 Cro. 8, 35. R. cont. on Demurrer. 2 Cro. 102.

And I conceive the contrary adjudication to be law.

So, if he alleges a debt due to the king. Com. Dig. Ibid. cites R. cont. 2 Cro. 182.

I am inclined to think that determination is right. The manner of pleading judgments, specialties, &c. as now used, is to aver the same to be for a true and just debt.

If defendant pleads several judgments, he may conclude each with an averment, or it may be more properly at the conclusion of the whole. 1 Salk. 312.

The present mode is to aver at the conclusion of the whole: it avoids prolixity.

If the defendant pleads several judgments, and no assets *ultra*, if any judgment be defective, the plaintiff shall have judgment: as, if one of the judgments was against the testator and others, and it does not appear that the testator survived, so that he might be chargeable. R. 2 Saund. 50. R. 1 Salk. 312.

It seems to me unnecessary in pleading a judgment, to state or name all the defendants against whom the recovery

was

was had. I think it sufficient to say that such an one, recovered against the testator.

If one of the judgments was in an inferior court, which does not appear to have jurisdiction. *R. 8 Co. 133. a. R. 2 Lev. 141.*

If a recognizance was by the testator and another, and it is not averred that the other has not paid. *R. 9 Co. 110. b.*

If one of the judgments be found fraudulent; for, though he pleads that he has only *5l. ultra* all the judgments, this is only form, and not traversable. If one of the judgments was in debt, where it ought to be in assumpsit. *R. 1 Vent. 198.*

The fairest way is to plead the judgment, and shew how much is due thereon.

To a special *plene administravit*, if the plaintiff replies that the judgment was obtained, or continued, by fraud, it is sufficient to alledge generally that it was by *covin*, without shewing the special matter. So, it is sufficient to say, it was by *covin* of executor or administrator only.

It is sufficient to say that the recognizance, &c. was for payment of a less sum, or for performance of covenants generally, and that the sum is paid in satisfaction, or no covenant broken, without mentioning the time or manner. And payment in satisfaction is sufficient, without saying that the conuzee was ready to acknowledge satisfaction. Acceptance in satisfaction is a sufficient ground to say, that the recognizance is continued by *covin*.

If the defendant pleads several judgments, the plaintiff may reply to each severally, or to all, or part, or one, at his election. If he replies to part, continued by fraud, he cannot reply to the others, *assets ultra*; for this is admitted.

If the plaintiff replies, obtained or continued by *covin*, the defendant may traverse, or join issue thereon. *5 Com. Dig. 178, 9.*

The present mode is to join issue, in order to avoid prolixity of pleading.

If an executor pleads *plene administravit*, and, after issue, *relicta verificatione*, confesses judgment, this is a confession of the debt, but not of assets. *R. 1 Rol. 929. l. 25. Hob. 178.*

If the plaintiff replies after judgments pleaded, that he prays execution when assets shall come to the hands of defendant, assets afterwards shall be in the first place applied to the judgments. *R. 1 Salk. 312.*

It

It must be so, for the plaintiff's prayer, by his replication, is, of assets, to come to the defendant's hands, after satisfaction of the judgments pleaded.

If the plaintiff on a *plene administravit*, does not pray execution, when assets shall happen, but joins issue that there are assets, and it is found against him, the judgment shall be, *that the plaintiff take nothing, &c.*

If assets are found, though to a small value, there shall be judgment for the whole debt, but the execution shall be only for the assets found. *Vide 5 Com. Dig. 179.* various authorities, *pro* and *con.* as to the execution.

I am inclined to think that the executor pleading a false plea, within his own knowledge, the judgment is as to damages as well as costs, *de bonis testatoris, si, &c. si non de bonis propriis.*

If there be two executors, and one is outlawed, and the other pleads *plene administravit*, there shall be judgment against both for the debt, but for damages and costs against him only who pleads. *R. 1 Rol. 928. l. 47. 930. l. 5.* So, if both plead, and it is found that one has, and the other has not assets, there shall be judgment against both. *R. 1 Rol. 929. l. 30.* Otherwise, if they plead severally by several attornies; for then he, who has not assets, shall be quit. *R. 1 Rol. 929. l. 50.*

He may plead judgments, without setting forth the consideration of them. *Stra. 407.*

An erroneous judgment is a good bar, if not fraudulent. *Ibid. Per Eyre J.*

If an executor does not plead a judgment against his testator to the action, he shall not afterwards plead it to the *scire facias*. *Stra. 732.*

Where a bond is forfeited in the life-time of the testator, the penalty is the legal debt, and on issue what is due, must cover so much assets; but on a bond where the day of payment is not come, the assets are covered only for the sum in the condition. *Stra. 1028. B. R. H. 219.*

If to debt on bond defendant pleads, that creditor by simple contract, had obtained judgment against him in the sheriff's court, in debt, as upon *concessit solvere*, according to the custom of *London*, he must add, that the administrator is bound to pay it; as if due on obligation, and he must shew that the contract was made within the city, or it will be bad. *Andr. 340.*

If plaintiff can only have judgment *de bonis testatoris*; *plene administravit* is a good plea in covenant, though the breach

breach assigned is for non-payment of rent incurred in their own time. 1 *Wils.* 4.

If executor, or administrator, suffers judgment by default, or confession, and an action is brought on that judgment, suggesting a *devastavit*, he cannot plead *plene administravit*; and so if he dies, and the action is against his executor, or administrator. 1 *Wils.* 258.

An administrator, trustee in intestate's marriage settlement, who covenanted to leave by will, or that his executors, &c. should pay 700l. to trustees, to pay the interest to his wife for life, then to divide among the children, and if none, as he should direct, may plead *plene administravit*, and give retainer in evidence, and plaintiff will be nonsuited, and cannot have judgment of assets *quando acciderint*; for if defendant dies, before the widow, and the co-trustee, the money will be out of his hands, at her death. 3 *Burr.* 1380.

After an order to plead *issuably*, he may plead judgment, confessed on bond since order. *Barnes* 330.

But after such order, the court will not grant further time, that another judgment may be perfected, that he may plead it. *Barnes* 333.

10. In an Action by an Administrator.

In an action by an administrator, he ought to be named administrator.

If there are several administrators, all must be joined.

The plaintiff must shew by whom administration was granted. And the want of it will not be aided on a general demurrer.

If it be granted by a peculiar jurisdiction, he must say at least, *to whom it belongs to grant, &c.* Or, *the ordinary of that place.* Yet, the omission of, *to whom it belongs, &c.* shall be aided after verdict. 5 *Com. Dig.* 180.

In due manner committed, imports it. *R. upon Demurrer.* 1 *Salk.* 40.

But if administration be alledged to be granted by an archbishop, or bishop, without more, it is sufficient. Or by an archdeacon; for he is *oculus episcopi*. Or by the official or commissary of a bishop. Or by the vicar general of a bishop; for this means his chancellor.

Yet, though a general allegation of grant of administration by an archbishop or bishop is sufficient in a declaration, or inducement to a traverse, it is not sufficient in a bar, or replication,

plication, for that must shew how he has authority. 5 Com. Dig. 180. *Vide ante*. No. 4.

So it must appear when administration was granted.

Grant of administration of the goods *which were of the intestate at the time of his death* is sufficient, without saying that it was granted *after his death*, for the other words import it.

If an administrator sues in the *debet and detinet*, except on his own contract, it will be bad. 5 Com. Dig. 180. *Vide ante*, No. 1.

If the plaintiff omits protest of letters of administration, in his declaration, it will be bad on a special demurrer. *Vide ante*, No. 1.

But default of shewing by, whom administration was granted, shall be aided after a verdict, by the *stat. 16 & 17 Car. 2. c. 8.* 1 Salk. 8.

Or by plea of *non est factum*, or other collateral matter. R. 1 Salk. 38.

An administrator, *durante minore etate* A. the executor, must alledge that A. is under the age of 17 years; for under 21 is not sufficient. 5 Com. Dig. 180. *Vide Administration Div. VI.*

And if he be administrator during the minority of several, he must alledge that all are under 17; for an averment that 3 are, and nothing said of the 4th, is not good. *Dub.* 5 Co. 9. *Dub. after verdict.* 1 Sid. 185 R. 2 Jon. 48.

The defendant may plead that the executor has attained his age of 17 years.

So, an administrator *pendente lite*, or during the absence of A. must shew that A. is absent, &c.

But an averment that A. is within age generally, is sufficient after verdict.

So without averment, if the defendant does not take exception to it; but pleads in bar, it is good; for thereby he admits the plaintiff to be able to sue him. And the judgment is not void in an action by an administrator *durante minore etate* of A. who is not an executor, but only intitled to administration, it is sufficient, if he alledges that A. is under 21 years; for in such case the administration does not determine at the age of 17 years. 5 Com. Dig. 180, 1. *Vide Administrator, Div. II. No. 6.*

An administrator shall bring an action on an assignment of a bail-bond made to him, as administrator, and not in his own name. *Fort.* 370.

If

If administrator of an executor hath a verdict, judgment shall be arrested, for there should be administration *de bonis non*. Barnes 444.

11. In an Action against an Administrator.

In an action against an administrator, it must be alledged that administration was granted to the defendant. But that it was granted *in due form of law* is sufficient, without saying by whom it was granted. See *infra*, the last case under this head.

In an action against an administrator, if he pleads, original purchased before administration granted, there is no occasion to shew by whom it was granted; for the plaintiff by his action against him, admits him to be a legal administrator.

If an action be against an administrator during the minority of another, the plaintiff need not alledge that the other is within 17 years, for a stranger cannot know when the defendant's authority determines, and if it be determined, the defendant ought to shew it. And therefore he may be charged by a stranger as administrator *durante minore etate* if he continues in possession after the executor attains 17 years. 5 Com. Dig. 181. Vide Administration Div. VI.

Or he may be charged upon the special matter. 1 Sid. 57.

Naming a defendant administrator in the declaration is a sufficient averment, without setting out that administration was committed to him. Barnes 159, 160.

12. Pleas by an Administrator.

In Abatement.

To an action against an administrator, he may plead in abatement that he is no administrator, but executor. Vide ante, No. 4.

So if he be sued as administrator generally, who is administrator during the minority of another. Lut. 20. Who administered about the funeral only. 37 H. 6. 28. a.

Another administrator not named.

If he pleads that he administered in a special manner only, and traverses the administration *modo et forma*, he must shew that

that he did that which would be an act of administration.
R. 37 H. 6. 28. a.

That the original is tested before the administration granted.
Lut. 8.

13. *In Bar.*

An administrator may plead in bar, *ne unques Administrator. Vide ante, No. 7.*

Plene administravit general or special. *Vide ante, No. 9.*

But if he pleads *retainer*, it is not sufficient to say, that administration was committed, without saying that it was committed to him. *R. 2 Jon. 23.*

The method now is, to plead *plene administravit*, and give *retainer* in evidence.

It is no plea in bar that he is executor, not administrator.
R. Skin. 365.

14. *Pleas to an Action by Administrator.*

To an action by an administrator the defendant may plead in abatement, that there is another co-administrator living not named. *Vide ante, No. 2.*

But he cannot plead that another has the right to the administration. *R. 1 Mod. 231.*

Or, in bar, that administration never was committed to the plaintiff. *Han. Ent. 105. Cl. Aff. 117.*

And this, if it was committed by a bishop or, peculiar; when it does not belong to him. *Vide Administrator. Div. II. No. 5.*

So, that the intestate at his death resided out of the diocese of the bishop, who granted the administration 1 *Salk.* 37.

So, that administration was granted to another. 1 *Salk.* 38.

15. *Judgment against an Executor, or Administrator.*

When de bonis propriis.

In an action against an executor, or administrator, if the defendant pleads a matter in bar, which lies within his own knowledge, and is false, judgment shall be for the debt as well as for damages and costs *de bonis testatoris si, et si non, tunc*

tunc de bonis propriis. As, if he pleads *ne unques executor*, and it is found against him, or, *ne unques administrator*.

If an action be against divers executors, and one pleads *ne unques executor*, and the others *plene administravit*, and it is found against them, there shall be judgment against all *de bonis testatoris si, &c. et si non*, against him, who pleaded *ne unques executor, de bonis propriis*.

In a *scire facias* against an executor, if he pleads *ne unques executor*, and it is found against him, the judgment shall not be for the debt *de bonis propriis*, for the plaintiff demands execution *de bonis testatoris*.

If an executor or administrator pleads a release to himself, and it is found against him, the judgment shall be for the whole *si non de bonis propriis*. Or payment, or performance by himself.

So in all cases on the return of a *devastavit* against an executor, or administrator, there shall be judgment against him for the debt as well as damages and costs, *de bonis testatoris, si, &c. et si non, de bonis propriis*. Or upon a return that the goods are *esloined*.

If there be judgment against husband and wife executrix, and a return that the husband wasted, it shall be *de bonis suis propriis*.

If a return that the wife wasted *dum sola*, it shall be *de bonis propriis* of both.

And if the first judgment was *de bonis testatoris si, &c. et si non, tunc dampna de bonis propriis* against husband and wife executrix, and afterwards a *devastavit* is found, the judgment shall be against them *de bonis propriis*.

If there be a *devastavit* by one executor only, the judgment shall be of his proper goods; for the executor shall not be charged for the wrong of his co-executor.

Yet if a *devastavit* be charged against two executors, and found *quoad* one, and nothing said *quoad* the other, it is bad.

Where an executor, or administrator is charged for his own proper act or default, the judgment shall be for the debt and damages *de bonis testatoris, et si non, de bonis propriis*: As, in *detinue* for a detainer after the testator's death. In debt for rent incurred after the death of the testator. In covenant for a breach after the death of the testator. *Vide post. No. 16.*

If an executor acknowledges satisfaction upon a judgment to the testator, which is afterwards reversed, there shall be restitution, *si non, &c. de bonis propriis*.

If the act or default of the executor or administrator is the foundation of the action, the judgment shall be *de bonis propriis* only: As, in assumpsit against an executor on his promise upon good consideration to pay the debt of the testator.

In covenant against an executor or administrator, for a breach by him of a covenant in a lease, which he hath as executor or administrator.

When the judgment is *de bonis propriis*, and upon a *feri facias*, *nulla bona* is returned, the execution shall be by *capias* or *elegit*. 5 Com. Dig. 182, 3.

What shall be a *devastavit*, and how found. *Vide Administration*, Div. IX. No. 1, 2.

If one executor pleads a good plea, the other a bad one, judgment shall be against one executor only. *Stra.* 20.

If judgment on verdict is signed after testator's death, a second in debt, on that judgment *de bonis testatoris*, whereupon error and judgment affirmed; a third suggesting a *devastavit*, *de bonis propriis*, and a fourth in debt on the last, and executor held to bail; all is regular. *Barnes*, 248.

16. *When not.*

In all cases where the action is against an executor or administrator, merely as executor or administrator; the debt shall be recovered only *de bonis testatoris*, and the damages, which are for the delay, *de bonis testatoris, et si non, de bonis propriis*. Unless the executor or administrator pleads a false plea: As *plene administravit*, which is found against him. *Vide ante*, No. 15.

So, if the breach be by the executor himself: As, if the testator covenants to pay 50*l.* if he, or his executor, sells the land, and the executor sells it. Though the executor might be charged as assignee, as well as executor. 5 Com. Dig. 183. *Sed Qu.?*

So, in covenant against an executor, upon the testator's deed, if the breach be alleged in *nonfeasance* by the executor himself, the judgment shall be *de bonis testatoris tantum*: As, for not repairing. *Ibid.* *Sed Qu.?* For not making offer of a presentation. *Ibid.* *Sed Qu.?* So, in debt upon a bond, for non-performance of covenants.

So, though the breach be for a voluntary neglect or act of the executor; for the charge is founded upon the deed of his testator. *Ibid.* *Sed Qu.?*

In all cases where the plaintiff is delayed, though the demand be *de bonis testatoris*; yet the costs or damages given for the delay shall be *de bonis propriis, si non, &c.* *Ibid. Sed Qu.?*

I have under this head, stated several cases from *Comyns*, but with queries, as I have great doubts about the law; I have omitted many, as being in my own opinion well convinced, they are not law.

If an action be brought against husband and wife, as executrix, or administratrix, the judgment shall be for damages and costs, *si non, &c. de bonis propriis* of both.

But if an executor or administrator, makes no delay or default, the costs or damages as well as the debt, shall be *de bonis testatoris tantum*: As, if he at the return of the summons acknowledges the action, and says that he has not assets, and it is found so. If at the return of the summons he pleads, that he was always ready, and yet is.

If the judgment be *de bonis testatoris, si, &c. et si non, tunc dampna, de bonis propriis*, the sheriff may not levy the damages *de bonis testatoris*, if he cannot levy the whole debt also *de bonis testatoris*; for the damages in such case shall be of the goods of the executor. And if the sheriff does otherwise, his return, and all proceedings thereon, will be bad. 5 *Com. Dig.* 183, 4.

PROCEEDING AND PLEADING, &c. IN ACTIONS BY AND AGAINST AN ASSIGNEE.

1. In an Action by an Assignee.

In an action by an assignee, the plaintiff must shew how assignee. If he sues for rent upon a lease by another, he must shew a legal estate or title to it. *R. Cro. El.* 535.

But if he shews an assignment, it is sufficient, though he does not name himself assignee. *R. 2 Cro.* 240. *R. per 3. J. Cro. El.* 823.

So, if an assignment be by husband and wife, where they were seised to them and the heirs of the husband, it is sufficient to declare as assignee of the husband; for the estate for the life of the wife is merged. *R. Cro. Car.* 285. *Jon.* 305.

2. In

2. *In an Action against an Assignee.*

In debt for rent against the devisee of the lessee, the plaintiff must shew an entry by the assent of the executor, or *virtute legationis*. *Cro. El.* 535.

But, it is sufficient to charge the defendant as assignee of *B.* to whom the lease is made, by which he covenants to repair; though he be only executor, or administrator, to such assignee. *R. Carth.* 519.

PROCEEDING AND PLEADING, &c. IN ACTIONS BY AND AGAINST AN ATTORNEY.

I think it necessary first to notice his privileges, before I enter into the forms of pleading.

I. *What Privileges an Attorney shall have.*

An attorney, in respect of his attendance at the court, cannot be pressed. *R. Cro. Car.* 11. Nor shall he be made constable. *Cro. Car.* 389, 585. *Noy.* 112. *Off. Brev.* 160, 162. Though there be a custom, that every inhabitant shall be chosen in his turn. *R. Cro. Car.* 389.

Nor, shall he be elected to any other office, against his will. *Cro. Car.* 11. 585. As to the office of overseer of the poor. Or, churchwarden. To any office within a borough.

So, he shall not be chosen collector of the lord's rent within a manor, where it is copyhold; though it be part of his tenure.

So, he shall not be amerced for not doing his suit at the lord's court, when his attendance at *Westminster* is required.

So, he shall not be obliged to do watch and ward. 1 *Com. Dig.* 476, 7.

Cent. per Jones, for he may do it by deputy. 2 *Rol.* 272. l. 25.

But, with submission, I think the *cont.* is not law. Suppose he cannot find a deputy. *Vide infra.*

An attorney in *B. R.* or *C. B.* may practise in any inferior court, unless he be excluded by act of parliament. *R. 1 Sid.* 410.

Or, by charter, whereby the court is erected, as in the case of the Marshalsea

If an attorney be denied his privilege, he may have a writ of privilege. And the writ of privilege for a suit, shall have in it a *superfedeas*. And *no procedendo* shall be afterwards granted, as it may, where the privilege was only in respect of a priority of suit.

So, if he be refused to practise in a court, where *de jure* he may, he shall have an action upon the case. *1 Com. Dig. 477.*

But by a rule *Mich. 1654.* An attorney shall not be allowed his privilege, if he has not attended his business for a year, except where he is hindered by sickness. *Vide Rules and Orders of C. B. 4.*

An attorney in *London* is exempted from serving in the militia, either by himself or deputy. *Stra. 1143.*

His privileges, (on a writ of privilege) shall not be discussed on affidavits. *Barnes 37.*

An attorney may retain money recovered by an executor, to discharge money due for business done for testator. *Semb. Barnes 38.*

Sed qu. de hoc, unless in proceedings commenced in testator's life-time, and continued by the executor?

An attorney shall have a writ of privilege not to serve in the trained bands of *London.* *Barnes 42.*

2. The Privilege of Suit.

So, he has a privilege to be sued only in the court, where he is an attorney. And he ought also to sue in the same court.

He shall have privilege in a suit in an inferior court under *5l.* In a suit by *qui tam*, &c.

And, if he sues and lays the action in *Middlesex*, the venue shall not be changed, though the cause of action arise in another county; for his attendance is required at *Westminster*. Otherwise, if he waives *Middlesex*, and lays the action in *London*, or elsewhere.

If an attorney sue an attorney of another court, or a scholar of *Oxford*, &c. the defendant shall not have his privilege.

If an attorney be sued, he need not find special bail.

If an attorney in *C. B.* be sued in *B. R.* by which he is supposed to be in custody of the marshal; yet he may plead his

his privilege before he has allowed the jurisdiction of *B. R.* for his being in *custody of the marshal*, is by constraint. *Sed Vide cont. post.* 398.

But he shall not have privilege, where the action is against him and his wife. Or, jointly against him, and other defendants. *1 Com. Dig.* 477.

Or by, or against him, as heir. *Semb. per Fitz. Dy.* 24. *a. cont. per 2 J. in marg.*

Or by, or against him, as executor, or administrator. Or, where he has absented himself from his practice for a long time. *1 Com. Dig.* 478.

I believe the rule now is, that an attorney must have practised within twelve months, to be intitled to his privilege.

He shall not have privilege, if he be sued upon a customary action; as, upon the custom of foreign attachment in *London*. Or, in a suit by the king; as, an indictment, or information. Or, where the king brings the action. Or, if sued in the exchequer, as accomptant to the king. *R. 9 Ed. 4.* 53. *b.*

Sed qu. de hoc, if he is not really an accomptant?

So, he may waive his privilege, if he pleases. *1 Com. Dig.* 478.

If he be sued elsewhere than in his own court, he may plead his privilege in abatement. *2 Bulst.* 207. *Lat.* 195. 639. *Tbo. Ent.* 4. *Off. Br.* 177. *Bro. V. M.* 496.

But it shall not be allowed upon motion, without plea. *R. Salk.* 544.

If he pleads privilege as an attorney, he may produce his writ of privilege, or admission upon record. And conclude, *prout patet per recordum*, and then the defendant cannot be denied to be an attorney. *R. Salk.* 545. *Skin.* 542.

Or, he may plead it without producing it, and then it may be denied. *R. Salk.* 545.

Qu. Suppose he pleads it, and produces his writ, or admission upon record, and concludes *prout*, &c. may not the plaintiff admit it, and *reply*, that he hath not practised as an attorney in any of his majesty's courts, &c. for twelve months?

An action upon the case does not lie for suing him in another court, knowing that he had privilege. *R. 1 Mod.* 209.

This is hard, and I should have thought otherwise, had it not been for the above resolution, as the defendant is really injured, being put to the trouble and expence of defending himself in a court where he ought not to be sued, and, though he *abate* the suit, he must pay his own costs.

If

If he waives his privilege, he cannot afterwards resume it. And therefore, after issue, or plea in an action against him in an inferior court, he shall not have a writ of privilege. *Dy. 287. a. in marg.*

The reason is, he, by pleading, has admitted the court to have jurisdiction.

If in such case, a writ of privilege be awarded, a *procedendo* shall go. *Dy. 287. a. in marg.*

Attorney of *C. B.* actually in custody of the marshal of *B. R.* shall not be suffered to plead his privilege. *Stra. 191.* This I conceive is law,

Plea of privilege as attorney in *B. R.* received, after appearance and bail. *Bunb. 113.*

An attorney shall not have privilege, if he sues in right of his wife, or joins with her in the action. *2 L. Raym. 1398.*

If attorney of *B. R.* sues attorney of *C. B.* who pleads privilege, the court will not determine on motion, whether privilege takes away privilege. *Stra. 837.*

If attorney sues by original, he waives his privilege. *Ib.*

Attorney of *C. B.* must put in special bail in *B. R.* and plead his privilege, after. *Stra. 864. 2 L. Raym. 1567.*

Attorney sued, may change the *venue* from any place to *Middlesex.* *Stra. 1049. Andr. 381.*

In *C. B.* he cannot, *Barnes 482.*

May change the *venue*, to the county of which he is clerk of assize. *Ibid.*

If attorney is plaintiff, wherever he lays the *venue*, it shall not be changed. *Ibid.*

If plaintiff and defendant are both attorneys, proceeding is by bill, not by attachment. *Stra. 1141.*

Attorney of *B. R.* arrested by *latitat*, shall be discharged on common bail. Motion of course. *1 Wils. 298.*

Attorney of *C. B.* arrested by *latitat*, must sue out his writ of privilege there, and plead it in *B. R.* *1 Wils. 306.*

An attorney, defendant, cannot waive his privilege. *2 Wils. 42.*

Attorney may be sued in *his* court, for any sum, however small, notwithstanding statute for recovery of small debts. *Barnes, 159. Also Vide Gardner v. Jessop, 1 & 2 Wils. 42.*

If a sixth clerk in chancery, pleads privilege, it is not enough to alledge, that he serves and intends to serve, &c. he must alledge that he is *actually attendant* on that duty. *2 Wils. 238.*

He

He must not alledge the custom, that the *chancellor* and other officers, &c. shall not be impleaded, but before the chancellor, in the court of chancery, for he cannot be impleaded before himself. *Ibid.*

If an attorney has left off practice, and is called *esquire*, he shall not be allowed privilege. 2 *Wils.* 232.

He has no privilege against being sued in the court of conscience in *London*. 3 *Burr.* 1583.

He has not privilege, if he does not sue by attachment, and declare in person. *Barnes*, 479.

If he sues in person, he may lay his action (even in assault) in *Middlesex*. *Barnes*, 479. 487.

The action shall be retained in *Middlesex*, though the attachment was not a *testatum* out of *Middlesex*. *Barnes*, 493.

3. For what Causes he shall Sue.

An attorney upon a retainer may have an *assumpsit* for his fees. So, he may have action upon the case upon *assumpsit*, where he solicits a cause in another court. So, if a solicitor, or agent for another retain him, and promise him his fees, an *assumpsit* lies against the solicitor, or agent.

So, an attorney may have *debt* for his fees. So, where he is only a solicitor in another court. And *debt* lies against the solicitor, or agent, who retained him. Yet *debt* lies against *him*, for whom he was retained. 1 *Com. Dig.* 478.

I think the action of *debt* more eligible, for if judgment goes by default, it is final, and the plaintiff may, in *debt*, often save the term, notwithstanding sham pleading, where he could not in *assumpsit*.

By the *stat.* 3 *Jac. c.* 7. All attorneys and solicitors shall give a bill of charges with their hand and name, before they charge their clients with any fees, or charges.

And to an action by an attorney, or solicitor, it may be pleaded, *that he has not delivered such bill of charges*. *R. Ray.* 245.

By the *stat.* 2 *Geo. 2. c.* 23. § 23. No attorney or solicitor of the courts at *Westminster*, Great Sessions, or Counties Palatine, shall commence an action for fees, &c. until a month after a bill of fees delivered to the party, or left at his dwelling-house, in *English*, and subscribed by such attorney, or solicitor.

If an attorney commences a suit for fees without complying with the terms of the *stat.* he will be nonsuited, upon the *general issue* only, being pleaded.

The

The *stat. 3. Jac. c. 7.* does not extend to an action by an attorney, upon a special promise. Or, upon an *in simul computassent*; where it does not appear to be for his fees only. *R. Carth. 57.* Nor, to an action for his fees, for removing a cause out of an inferior court by *habeas corpus.* *R. Carth. 147. Sed qu. de hoc?*

The same law, I conceive, applies to the *stat. 2. Geo. 2.* just mentioned.

When an attorney shall have an action for words, *Vide in Action upon the Case for Defamation. Div. IV. No. 24.*

4. How an Attorney shall sue,

If an attorney commences an action, as such, the first process is an attachment of privilege. *Lut. 31.* A declaration by an attorney shall be in *propria persona.*

But, if an attorney sue by original, he ought to declare in common form, and not upon his privilege. Yet it is but form, and cured upon a general demurrer.

He may declare by bill, or upon original, at his election. *1 Com. Dig. 479.*

To an action by an attorney for fees in an inferior court, the defendant cannot plead, that no bill was delivered under his hand, according to the *stat. 3. Jac. c. 7. R. Sho. 96. 1 Salk. 86. Carth. 147. Vide. 2 Geo. c. 23. § 23.*

By the *stat. 2 Geo. 2. c. 23.* After a bill of fees delivered, on application to the court, or a judge of the court, where the business, or the greatest part thereof in value was done, by the party, or any other authorized, and his submission to pay what shall appear due on taxation, the bill shall be referred, without the money being brought into court.

And such bill may be referred, though no suit be depending, &c. And no suit shall be, during such reference, or taxation. And, if the attorney, or solicitor, or party chargeable, refuse to attend the taxation, the officer may tax the bill, *ex parte.*

And if the party pay what is due on the taxation to the attorney, solicitor, or any other authorized who attends the taxation, or as the court shall direct, it shall be a full discharge: And in default of payment, he shall be liable to an attachment, or such other remedy at the election of the attorney, or solicitor, as he was before liable to.

And,

And, if the *attorney*, or *solicitor* appear to be overpaid, he shall refund, &c. or be liable to an attachment, or other proceeding at the election of the party, as he was before liable to.

If the bill be taxed at a sixth part less than delivered, the attorney, or solicitor shall pay the costs of the taxation; if not so, the court at discretion shall charge the attorney, or client, in regard to the reasonableness, or unreasonableness of the bill.

If attorney delivers his bill, and after his death it is taxed, and above a sixth part struck off, yet his executor shall not pay costs. *Stra.* 1056.

By 12 Geo. 2. c. 13. § 5. Attorneys may write their bills of fees with the usual abbreviations.

And the *stat.* 2 Geo. 2. c. 23. does not extend to bills of fees between one attorney and another.

In case of an executor of an attorney, testator's bills need not be signed, nor are they liable to taxation by *stat.* 2 Geo. 2. *Andr.* 276. *Barnes*, 119. 122.

Attornies and solicitors are intitled to a satisfaction for their expences, out of the fund, whether in the way of suit or prosecution, in lunacy or bankruptcy. 2 *Vezey*, 407.

If a client has his attorney's bill taxed, he submits to pay, and cannot afterwards have an antecedent demand deducted out of it. 2 *Vezey*, 451.

C. B. will not stay proceedings on motion, because a bill is not delivered, it is not irregular, but illegal. *Barnes* 36, 123, 243.

An attorney's bill for conveyancing cannot be taxed. *Barnes*, 41.

After writ of enquiry executed, bill cannot be taxed. *Barnes*, 124.

Nor after bill is paid. *Barnes*, 46. *Sed Q.* For after bill delivered, attorney accepted of less than the amount of the bill, afterwards bill was taxed, and above five-sixths of the money accepted, (but less than five-sixths of bill) being allowed, client pays costs of taxation, and the surplus returned by attorney. *Barnes*, 28.

Attornies, though of different courts, must sue each other by bill. *Barnes*, 43: 4.

Attorney of *C. B.* may sue attorney of *B. R.* for a debt *bona fide*, by attachment of privilege, and he shall not have privilege. *Barnes*, 44.

He must be sued in *qui tam* actions, by bill. *Barnes*, 48.

Seven

Seven pounds in 75*l.* being taken off, client shall pay costs of taxation. *Barnes*, 118.

Bill for business done in a court below, taxed there, and action brought for it in *C. B.* cannot be taxed by prothonotary. *Barnes*, 124.

If attorney brings action within the month, the court will not stay proceedings, for it may be pleaded. *Barnes*, 123. *Qu* If not given in evidence, on general issue?

If there has been judgment and enquiry, they will set them aside, on costs, bringing money into court, general issue, and short notice. *Barnes*, 243.

A client cannot move for a bill, and for taxation, at one time; but first for a bill, and when delivered, for taxation. *Barnes*, 126.

If less than one-sixth is deducted, attorney has not a rule for costs of taxation absolutely, but to shew cause, for it is in the discretion of the court. *Barnes*, 147.

Attachment of privilege against two; one does not appear; plaintiff appears and signs judgment, error brought, the joint attachment warrants proceedings. *Barnes*, 423.

The attachment of privilege, is the commencement of the action, and the bill must be delivered a month before that. *Barnes*, 461.

5. *How an Attorney shall be sued.*

An attorney shall be sued by bill original, and not by writ. *Lut*, 228. 233. *Clift's Ent.* 572. The bill must be filed, though there is a consent to appear. *Salk.* 544. And the bill may be filed against him at any time within the term. *Mod. Ca.* 175. But not after, or before, though it be upon the *essoign* day. *Mod. Ca.* 106. *Salk.* 544.

If he is forejudged, he shall not be sued by bill. *Barnes* 41. If a second forejudger is obtained, pending the first, it shall be set aside; he must be sued by original, *Barnes*, 43.

If plaintiff, an attorney, sues defendant, an attorney, by *capias*, proceedings shall be staid, though defendant has had time to put in bail. *Barnes*, 53.

If an attorney sues an attorney by *capias*, and defendant appears, proceedings shall not be set aside, but he may plead privilege. *Barnes*, 424.

6. *The Declaration.*

The declaration ought to be against him, *here in court*, and not *in custody of the marshal* 1 *Mod.* 10. 1 *Sand.* 28.

He shall not give special bail. 1 *Mod.* 10.

If the declaration concludes, "and therefore brings suit", instead of, "and therefore he prays relief," it is good in *B. R.* though not in *C. B.* *And.* 247.

7. *Plea.*

To an action against him, an attorney ought to plead within four days after the rule given. And a rule may be given the same term, if the bill was filed four days before the end of the term. *Mod. Ca.* 175.

But if filed only three days before the end of the term, he shall have four days to plead the next term after. *Ibid.*

The defendant, being an attorney, must plead in proper person. And if he appear in person and plead, and the entry be, *that he appeared at Nisi prius by attorney*; it will be error. *R. 2, Cro.* 265. Yet being but a misprision of the clerk, it may be amended. *Ibid.*

If being present he refuse to appear, except by attorney, there shall be judgment against him. 1 *Sid.* 134. *i. e.* If he is an officer of the court.

If an action be for a thing done without warrant, the defendant may plead *quod retinuit*, &c. *Ashton's Ent.* 39.

Quod non fuit informatus de responso. *Cl. Aff.* 290. 1 *Bro. Ent.* 33, 4.

*Proceeding and Pleading, &c.**In actions, by and against a Corporation.*1. *In an Action by a Corporation.*

In an action by a corporation they ought to sue by the name of incorporation. And may sue by that name, though enabled to sue by another name. And the christian name of the mayor or head is not necessary. Though it be in ejectment on a demise by a corporation.

But a corporation may prescribe to be incorporated by one name, and to be impleaded by another. Or may claim it by grant.

A sole corporation must always show *quo jure* he is seized. And shall be named by his name of baptism.

And if persons are incorporated to the use of an hospital, they must say, seized *in right of their incorporation*, not of *their hospital*.

But mayor and commonalty need not alledge seisin in right of their incorporation; for the name imports an incorporation. 5 Com. Dig. 169.

2. In an Action against a Corporation.

If an action against a corporation, they must be sued by the name of incorporation. And if it be an aggregate corporation, it is not well to name the proper name of the head.

But if it is a sole corporation, the proper name may be mentioned. And so it must be in personal actions, where outlawry lies.

If a corporation be misnamed, it may be pleaded, but it is only in abatement. So, it may be pleaded in abatement, if the name of the head be added and mistaken.

Or, if a corporation and another, are joined, for there is different process against him. Though the person joined be a member of the corporation.

Or in an action upon a specialty, if the name varies from the specialty.

To *misnomer* in a personal action, the plaintiff may say, known by one name or the other.

Otherwise, in a real action, for he cannot hold the land but by his true name.

He who pleads an act of corporation by one name, and afterwards by another, ought to shew how the name was altered.

The process against an aggregate corporation is distress.

But process of outlawry does not lie against an aggregate corporation. And therefore trespass does not lie against them, but only against particular persons; for a *capias* and *exigent* do not go.

But in *chancery*, if it has nothing whereby to be distrained, on a petition to the lords in parliament, it may be ordered, that if the corporation do not appear on a *disfringas* issued, the bill shall be taken *pro confesso*.

It is not sufficient, if the particular persons distrained appear at the return of the process. Or, if all the members of the

the corporation appear in person. But the corporation must appear by an attorney, appointed under their common seal.

In pleading, a mayor and commonalty may prescribe, that they and their predecessors, &c. tho' the commonalty have no predecessors.

If a man makes conuſance as bailiff to a corporation, he need not ſhew how they were incorporated. If a man pleads an act by a corporation, he need not alledge a deed; for it ſhall be intended: as if he makes conuſance as bailiff to a corporation. If he pleads a preſentation to a church by a corporation. A leaſe for life, without a deed, to make *livery*. A feoffment to them, without a deed to receive *livery*. Entry for a forfeiture. Acceptance of rent, or of a man to be their tenant. A fine levied, or deed inrolled.

But if he juſtifies under a corporation, he ought to ſhew a deed. As an entry by command of dean and chapter. 5 *Cam. Dig.* 169.

PROCEEDING AND PLEADING, &c. IN ACTIONS BY AND AGAINST AN HEIR.

1. *In an Action by an Heir.*

In an action by an heir, who ſues upon a grant or covenant to his anceſtor and his heirs, he muſt be named heir. Otherwiſe, if he ſues in his own right, tho' he comes to the right by deſcent: As in *detinue* of charters which he claims as heir. *Tb. D. l. 3. c. 6.*

So he muſt ſhew how heir. 1 *Salk.* 355.

Debt by the heir or ſucceſſor ſhall be in the *debet and detinet*. 47 *Ed. 3. 23. b.*

2. *In an Action againſt an Heir.*

In an action againſt an heir, the defendant muſt be named heir. But it is ſufficient if he is ſo named in the count, tho' not in the writ. *Reg.* 140. *a.*

And, if it be againſt the heir of an heir, the plaintiff muſt ſhew how heir ſpecially, for againſt him as heir generally to *A.* if he pleads that he has *riens per diſcent* from *A.* it ſhall be found for the defendant. *R. Cro. Car.* 151.

If

If it be against an heir in *gavel-kind*, it shall be against all the sons together. *Bro. R.* 195. *Bend. pl.* 205.

By the *stat.* 3 & 4 *W. & M. c.* 14. An action may be brought against the heir, and devisee of the land jointly. *Vide Clift.* 243.

So in an action against an heir, on the bond, &c. of his ancestor, the plaintiff must shew that the heir was bound. So, in an action upon an *assumpsit* to pay the debt of his ancestor. *R.* 2. *Sand.* 136. *R. cont.* 1 *Sid.* 31. If the heir was not liable, his promise might be considered as void.

And the omission shall not be aided after verdict. *R.* 2 *Sand.* 136. *Ray.* 128. 1 *Vent.* 159. But it may be amended. *Lut.* 508.

Debt against an heir on the bond of his ancestor shall be in the *debet and detinet.* 5 *Com. Dig.* 185. Various authorities.

And, if the heir receive sufficient out of the land, and die before recovery against him, debt lies against his executor. *Semb. Dy.* 344. *b.* And there is no need to shew in the declaration, that the heir had assets, for it shall be intended *prima facie.* *Ibid.* *Vide* 3 *W. & M. c.* 14.

But in an action against an heir, it is sufficient that he be named heir to him who was last seised.

So if *A.* tenant for life, remainder to his eldest son in tail, remainder to *A.* in fee, dies, and the eldest son enters and afterwards dies without issue, debt lies against the younger son, as heir to *A.* without naming his elder brother.

So the plaintiff need not shew how the defendant is heir; for it does not lie within his knowledge.

The omission of *debet* shall be aided after verdict. 5 *Com. Dig.* 185.

3. *Pleas by an Heir.*

If an action against an heir in the place of his ancestor, if he is within age, he may pray that the *parol* may demur 'till his full age. [In other words that the *plea* or suit may remain, or stand still.] *Cl. Ass.* 401. *Vide Infant, Div. IV. No. 1.*

So in debt against heirs in *gavel-kind*, if one be within age. *Ass. Ent.* 241. *Bro. R.* 195. Or against parceners. 3 *Co.* 13. *a.*

But, if all are outlawed, and the others are pardoned, but not the infant, the *parol* shall not demur for the nonage of the infant.

At

At the full age of the infant (where the *parol* demurs,) there shall be a re-summons against all the co-heirs.

The heir cannot plead that the executor, or administrator hath assets. Or, that there is an executor or administrator; for the obligee may sue one or the other. Or, that there is another action depending against him as executor. 5 *Com. Dig.* 185. cites as to the last point, *R. 3 Lev.* 303, 4. *Sed qu. de hoc?* This was not an unanimous judgment.

Or, that the plaintiff hath recovered part against the executor, or administrator. *Semb. 3 Lev.* 304.

The safest way for the heir is to confess the action, and shew the certainty of the assets descended to him. *Pl. Com.* 440. a. Or, if he has no assets to plead *riens per descent*. Or, if he has only a reversion after an estate-tail; for he may plead generally, *nothing by descent*. So he may plead, *nothing but a reversion after an estate for life or years*. Or, except such lands and also a reversion.

But he cannot plead a recovery of dower by a decree in chancery.

An heir may plead a release to himself. Or, a release to the executor or administrator of the obligor. Or a bond by the executor or administrator for the same debt. Or retainer for his own debt. 5 *Com. Dig.* 185, 6. *Qu.* as to the last point. 2 *Ver.* 62.

If the heir confesses assets, he ought also to confess the action. *Semb. Lut.* 444.

If he has a reversion, that the lessee entered, and the reversion descended. *Dub. Lit.* 444.

And he cannot pray a delay of execution during the term. *R. 1 Salk.* 355.

An heir may plead that he has paid debts to more than the value of the lands descended to him. *R. on Demurrer*. In *C. B. Buckley v. Nightingale*. *M. 12 Geo. Stra.* 665.

4. Replication.

To *riens per descent* the plaintiff may reply, *assets descended*. *Ast. Ent.* 240. *Dy.* 344. b. *Bro. R.* 195. Or a writ purchased by *Journey's Accompts*, and that he had assets at the purchase of the first writ. *Lut.* 290. &c.

So, if he pleads *riens per descent prater a reversion after an estate-tail*, the plaintiff may say, that assets descended generally; for *prater*, is idle, and the plaintiff shall answer to the material part only. *R. 2 Mod.* 50.

So,

So, by the *stat. 3 & 4 W. & M. c. 14.* the plaintiff may reply, that the defendant had assets by descent before the original purchased.

After *riens per discent* pleaded, the plaintiff may pray execution of assets *cum acciderint*. Or if *riens per aiscnt prater*, he may pray execution of assets confessed. Or reply that the defendant had assets *ultra*. And if he reply assets *ultra* he may waive it, and pray judgment of assets confessed. So of a reversion *cum acciderit*. 5 *Com. Dig.* 186. 1 *Rol.* 57.

And now by the *stat. 3 & 4 W. & M. c. 14.* that he had assets before the original purchased, or bill filed, and if it be found so, tho' the heir has aliened, the plaintiff shall recover against him, to the value of the sale, tho' the alienation made *bona fide* shall be in force.

It need not say to the value of the debt; for the value is not material. *Semb.* 5 *Mod.* 123.

5. Judgment against an Heir.

If the heir confesses the action, and shews the certainty of assets, he shall not be charged in person, goods, or other land, except what he had by descent from his ancestor.

If he pleads, *riens prater a reversion*, the plaintiff may take judgment for debt and damages, of the reversion aforesaid to be levied when it shall happen.

But if the heir pleads a false plea, which he knows of his own knowledge to be false, there shall be judgment against him generally, and execution of his own proper lands and goods, and against his body by *capias ad satisfaciendum*, like as for his own proper debt. So, if he pleads *riens per discent*, and it is found against him. So, if he pleads payment by his ancestor, and it is found against him. 5 *Com. Dig.* 186. As to last point *R. per 3 J. Dolb. cont. Sho.* 78. *Vide infra.*

Or payment by another bond. Tho' the assets found are small, and not to the value of the debt.

So, if the plaintiff shews to the court, that the defendant has received from the death of his ancestor, before the original sued, assets out of the profit of land which descended, and the defendant does not deny it.

Vide stat. 3 & 4 W. & M. c. 14. Sect. antepenult.

Or, on judgment by confession, if he does not shew the certainty of the assets. *Vide stat. 3 & 4 W. & M. c. 14.*

So, if judgment be against the heir upon demurrer. *Pl. Com.* 440. b. *Per stat. 3 & 4 W. & M. c. 14.*

Or,

Or, by any other means, except confession and shewing the certainty of the assets. *Pl. Com.* 440. a.

By the *stat.* 3 & 4 *W. & M. c.* 14. a devisee of land who is suable with the heir by that statute, shall be liable for a false plea by him pleaded in the same manner as the heir should have been for a false plea, or not confessing the assets descended.

But if there be judgment against the heir upon a false plea, as for his proper debt, it shall be only of a moiety of all his lands. *R. Jon.* 87.

So, in *scire facias* against an heir, for he is charged as *tertenant*. *Cro. Car.* 296, 313.

And the plaintiff shall have his election to take judgment against him, as for his proper debt of the moiety, or to take judgment of all the lands, which he has by descent. *R. Jon.* 88. 2 *Rol.* 71. l. ult^a & l. 10. *D. Poph.* 155.

Yet if he takes judgment for the lands, which descended, it will be error, if it does not appear to be by plaintiff's assent. *R. 2 Rol.* 71. l. 20.

Though it is found by the jury, who find the issue, or by writ of inquiry, that he has lands by descent. *R. 2 Rol.* 71. l. 30.

Yet in a *scire facias* upon a judgment, or recognizance, against an heir, if he pleads a false plea, the judgment shall be special against him for assets which descended. *Dy.* 81. in *Marg. R. Jon.* 87. *Carth.* 93. *Vide supra.*

In debt against an heir upon a deed of his ancestor, who pleads *non est factum*, and it is found false, the judgment shall be only for assets which descended; for it was not false in his own knowledge. *R. Cro. Car.* 437.

So by the *stat.* 29 *Car.* 2. c. 3. (which makes a trust in fee-simple, and also an estate *pur autre vie*, which comes to the heir as a special occupant, assets in the hands of the heir,) no heir, who becomes chargeable by that act, shall by reason of any kind of plea, confession, or *ment dedire*, be chargeable to pay out of his own estate.

So by the *stat.* 3 & 4 *W. & M. c.* 14. If the defendant pleads *riens per discent* the day of the original or bill filed, the plaintiff may reply *assets, before the original*; and if it is found for the plaintiff, the jury shall inquire of the value of the lands descended, and thereupon judgment and execution shall be awarded.

6 Execution.

Execution shall be against the heir for the whole of the land descended. And, if land descends to the eldest son, and other land, being of the nature of *Borough English*, descends to the youngest, the whole shall be taken in execution.

So, if land descends as well on the part of the mother as on the part of the father, the whole shall be taken. 5 *Com. Dig.* 188. As to the last. 3 *Co.* 14. a. *Jon.* 88.

So, if land descends to *parceners*, the whole shall be taken. 5 *Com. Dig.* 188. So, if land of the nature of *gavelkind* descends. *Jon.* 88.

And if execution be sued against one son or daughter only, it may be avoided by *scire facias*, or *audita querela*; for all the heirs ought to be contributory. 3 *Co.* 13.

If there be an action against an heir by *A.* and afterwards another action by *B.* who has judgment first, he shall have execution prior to *A.* though he obtain judgment afterwards. 1 *Mod.* 253.

If there be an action against an heir, and judgment thereon, the execution shall be of the land in his hands, which descended, though he has paid to other creditors to the value of the land, in his hands. *Keilw.* 63. b. For he ought to have pleaded the payment.

But if there be judgment against the ancestor, who afterwards aliens part, and dies, and execution be sued against the heir only, it is well; for he shall not have contribution against the alienee. *R.* 3 *Co.* 12. b.

So, if there be judgment against an heir on *nil dicit*, the plaintiff shall not have a *capias ad satisfaciendum* against him; for it is not his proper debt. *Dy.* 81. a. *R. cont. Cro. El.* 692. So, if judgment be against him, on, *non sum informatus*. *Dy.* 81 a. in marg.

What lands are assets in the hands of the heir. *Vide* 1 *Com. Dig.* *Tit. Assets.* (A.)

PROCEEDING and PLEADING, &c. in ACTIONS by and against HUSBAND and WIFE.

I. In what Action Husband and Wife ought to join.

In all actions real for the lands of the wife, the husband and wife ought to join. So, in a right of ward.

So, in actions personal, for a *chose in action*, due to the wife before coverture, they ought to join: As, in debt upon a bond, or specialty made to the wife before coverture. So, debt for rent, upon a lease for years due before the coverture. Or, upon a lease for life.

So, in an avowry for rent upon a lease for life, or years, before coverture.

So, in debt for rent upon a lease at will by the wife, before coverture.

So, in *trover*, upon a conversion of the goods of the wife, before coverture. In *assumpsit*, upon a promise to the wife before coverture. Or, for the labour of the wife *dum sola*.

In an action upon the case, for stopping a way to the wife's close, before marriage.

So, in debt for arrearages upon an account, found before auditors assigned by the husband and wife to the receiver of the wife.

So they ought to join in actions, which arise during the coverture, if the wife might have an action for the same cause, if she survive. As, in *detinue* of charters of the wife's inheritance. In *trover*, for a deed of rent-charge granted to the wife *dum sola*, though it was lost after the coverture. In an action upon the *stat. 8 H. 6. c. 9.* for a forcible entry, or detainer. In covenant as assignees of *B.* upon a covenant to make assurance to *B. his heirs and assigns.* 1 *Roll.* 348. l. 25. *Jon.* 406, 7.

Or, upon other covenant as assignees, where the assignment is to both.

So the husband and wife ought to join in waste, upon a lease for years by the husband and wife, seised in right of his wife.

So for a personal wrong to the wife, the husband and wife ought to join: As, for a battery of the wife. Or, false imprisonment of the wife.

Though a thing be added by way of aggravation, which goes only to the damage of the husband: As, if it be added,

That the business of the husband remained undone. 1 Com. Dig. 575. for the last point cites. R. 1 Salk 119.

But with due submission, nothing to the actual damage of the husband ought to be alledged, or if alledged, it ought not to be proved; such as tearing the cloaths, or expences in curing of wounds, nursing, &c. because if the husband chooses to sue for that, he ought to sue alone, the damage being to him only; and where such matters are stated in a declaration at the suit of husband and wife, the jury ought to find their verdict for the battery of the wife only.

Husband and wife ought to join in an action on the case, for maliciously indicting the wife. Jon. 440. Vide post. Div. III.

So, in an action for a thing due to the wife *in autre droit*, they ought to join: as, if they sue for a debt, &c. to the wife, as executrix, or administratrix.

So, if a debt to the wife's testator be paid to *A.* for the wife, without an express direction of the husband, they ought to join in an action against *A.* and the husband alone cannot sue for money received to his use. R. 1 Salk. 382.

If it be referred to a master in *Chancery* to take an account of what is due to husband and wife, who reports the sum due, and appoints it to be paid to the husband, and the defendant is committed for non-payment, and escapes; the husband and wife may join in an action against the warden. Str. 726.

In trespass, for treading down the grass of the inheritance of the wife. Bunb. 277.

If *feme covert* hath a mill, and one agrees with husband and wife to grind all his corn at this mill, under penalty to be paid by offender to offended; they must join, for the action would survive to her. 1 Wilf. 224.

The husbands should be joined in an action, to assert the right and interest of their wives, as the dippers at *Tunbridge-wells*, against one who disturbs them in their employment. 2 Wilf. 414.

If a woman sues or is sued alone, when she is *covert*, or a husband, when the wife ought to join or be joined, the writ shall abate.

In an action by husband and wife, it is good, if the husband and wife appear in proper person; for though the husband has no privilege when his wife is joined, yet any one may sue in person. R. Cro. El. 537.

If husband and wife, seised for their lives, and to the heirs of the husband, alledge a prescription in both; for though
the

she has only for life, she was seised jointly with her husband who had the fee. *R. Cro. El.* 112.

So, in *assumpsit* by husband and wife as administratrix, the declaration may say, that the money was had and received to the use of the aforesaid husband and wife as administratrix. *R. 4 Mod.* 376.

So, it is sufficient to say, to answer to husband and wife, to whom administration was granted, for, to whom refers to the wife, who was last named. *R. Lat.* 212.

If the declaration alleges a seisin in right of the wife, it ought to allege, that both are seised (and not the husband only) in right of the wife. And if the seisin is for the life of the wife, it ought regularly to be averred, that the wife is alive. *5 Com. Dig.* 167.

But a declaration by the husband and wife, is not good, if it alleges, that the husband and wife, were possessed of the goods, &c. in *trover*. *Semb. 1 Salk.* 114.

So, if in trespass it alleges battery of both, for the wife ought not to be joined for a battery of the husband. *1 Rol.* 782. l. 10.

But, upon *not guilty* pleaded, you may give in evidence the battery of the wife, and the jury may find damages for that battery, and the defendant not guilty, as to the battery on the husband, and no evidence ought to be given of it.

If in breach it be alleged, that he did not execute to the wife whilst sole, nor to the husband and wife since marriage, without saying, or to either of them, is bad. *R. Lut.* 415. So, if in trespass, *assumpsit*, &c. where the wife need not join, it is alleged to their damage. So, *assumpsit* for money lent by husband and wife to their damage. If, in *trover*, the conversion is alleged to their damage.

Yet, in trespass, *quare clausum fregit*, and their herbage thereof coming, &c. is good; for as they may join in a *clausum fregit*, so they may in the profits thereof.

So, where the action survives, they may declare to their damage.

So, in trespass by husband and wife for the battery of the wife, and other wrongs to them did, is good.

A defect in a declaration by husband and wife may be aided by verdict. *5 Com. Dig.* 167, 8. As to the last point, *Vide Action, Div. VI.*

In action for a demand not accruing to the wife, *dum sola*, wife only taken in execution for costs, shall be discharged. *Barnes*, 207.

II. In what the Husband shall sue alone.

Where the wife cannot have an action for the same cause, if she survive her husband the action shall be by the husband alone. As, in an *indebitatus assumpsit* for the labour, &c. of the wife during the coverture. In an *indebitatus assumpsit*, upon any promise to the wife after coverture. *Vide post. Div. III.* In an *assumpsit* to the husband, in consideration of forbearance, &c. to pay a debt due to the wife before the coverture. *Vide infra.*

So, in an action upon the case for disturbing him in his common, which he has in right of his wife. *Vide post. Div. III.*

In action upon the case for words spoken of the wife, by which the husband has special damage. In an action upon the case for a battery of the wife, whereby he lost her fellowship and assistance. Or, for carrying away the wife, whereby, &c.

In debt upon a bond made to the wife after coverture. *Vide post. Div. III.*

In covenant to husband and wife, by indenture between them of the one part, and *A.* of the other part; and may declare upon a covenant to himself.

So, in trespass, for a trespass done upon his wife's land, during the coverture. *1 Com. Dig. 576.*

In the last case, trespass is a *possessory* action, and it does not signify to whom the land belongs.

In trespass for taking charters of his wife's inheritance. *1 Rol. 347. l. 32.*

In an action upon the *stat. 5 R. 2. §. 1. c. 8.* *Vide post. Div. III.*

In *trover*, &c. for tithes severed from the nine parts, which belong to the wife's rectory. *Jon. 325.*

So, in a *quare impedit*, upon an avoidance during the coverture.

So, in debt for rent, upon a lease by the husband and wife after the term expires. So, in debt, for rent incurred during the coverture, upon a demise by the husband of land, which he has in right of his wife, though the term continues. *Vide post. Div. III.* So, if the demise was by the husband and wife. So, if the reversion after a lease made, was granted to husband and wife.

So,

So, an *assumpsit* lies by the husband alone, upon a promise to him, in consideration of forbearance, to pay a debt due to his wife as executrix.

In an action upon the case for maliciously indicting husband and wife; for the wife ought not to join for indicting her husband. 1 *Com. Dig.* 576,7.

In trespass by the husband for breaking and entering his house, and beating his wife; the breaking and entering the house, is the cause of action, and the beating the wife is well joined in the declaration to aggravate damages. *Stra.* 61.

In trespass by husband, for entering his house, and keeping him out, and taking his goods to the value, &c. and for that he assaulted and beat his wife, and took her goods to the value, &c. *ad dam.* 100*l.* and 100*l.* damages given, held good. *Fort.* 377.

The husband may sue alone for the malicious prosecution of his wife, whereby they both were scandalized, and he put to expence. *Stra.* 977. *B. R. H.* 54.

III. In what the Husband may sue alone, or join with his wife.

In actions for a profit incurred during the coverture, to the husband in right of his wife, the husband may sue alone, or join with his wife.

An avowry for rent of land, which the husband has in right of his wife, incurred during the coverture, may be by the husband and wife. Or, it may be by the husband alone.

So covenant against a lessee for years, for not repairing during the coverture, where the reversion is granted to husband and wife, may be by the husband alone. Or, by the husband and wife. 1 *Com. Dig.* 577.

So, an action upon the case for cutting down trees, the lops of which were reserved to the wife for her life, may be by the husband alone. *Semb. Cro. Car.* 438. *Vide infra.* Or, by the husband and wife. *Ibid.*

So, in debt upon the *stat.* 2 *Ed.* 6. *c.* 13. for not setting out tithes upon the land, which the husband has in right of his wife, they may join. Or the husband alone may sue.

So, in action for a *tort*, which prejudices a remedy by husband and wife, the husband may sue alone, or they may join: As, in *rescous* for a distress of a rent-charge due before the coverture, the husband alone may sue; for it is a wrong to him. Or, they may join.

So, in an action for champerty, or maintenance in a suit against the husband and wife, the husband also may sue. Or, they may join.

So, there may be a *scire facias* by the husband alone, upon a judgment for damages by the husband and wife.

So, if the cause of action be only commenced before coverture, and compleated afterwards, the husband alone may sue, or the husband and wife may join : As, in *trover*, where the goods were lost before marriage, and the conversion was after, they may join. Or, the husband may sue alone.

So, if a woman lease for years, rendring rent, and afterwards marry, the husband and wife may sue for rent due after the coverture, or the husband alone shall have debt for it.

So, where the wife is the meritorious cause of action, the husband alone may sue, or the husband and wife may join, though damages only are recovered : As, in *assumpsit* to the wife after coverture for a cure, the husband and wife may join. Or, the husband may sue alone. *Vide ante, Div. II.*

So, upon a promise to pay 8*l.* *per annum* to the husband and wife during coverture, they may join. Or, the husband alone may sue.

So, upon a bond to the husband and wife after coverture, or to a *feme covert* by herself, they may join. Or, the husband alone may sue. *Vide ante, Div. II.*

So, if there be an award to pay so much money to the husband, and so much to his wife, they may join for the money awarded to the wife. Or, the husband alone may sue. 1 *Com. Dig.* 577,8.

But, it will be more eligible for the husband alone to sue, as he may then recover both sums in one action.

In an action for a *tort* during the coverture, if it may be to the damage of the wife, if she survive, as well as of the husband, they may join, or the husband shall sue alone : As, in *trespass* for cutting down trees upon the land of the wife, the husband and wife may join. *Vide supra.* Or, the husband alone may sue.

In an action upon the *fl.* 5 *R. 2. c.* 8. for entry into the wife's land, they may join. Or, the husband alone may sue. *Vide ante, Div. II.*

So, in an action upon the case for stopping a way to the wife's land, they may join. Or, for inclosing land in which

which the wife hath a common. Or, for not grinding at the wife's mill. Or, in these cases of stopping the way, inclosing the common, or not grinding at a mill, the husband alone may sue. *Vide ante, Div. II. 1 Com. Dig. 578.*

So, in a *clausum fregit* upon the wife's land, they may join. *Dub. 2 Vent. 195.* Or, the husband may sue alone. *2 Vent. 195. Vide ante, Div. II.*

So, for a wrong founded upon one intire record against both, they may join, or the husband alone shall sue: As, in an action upon the case of nature of a conspiracy, for maliciously indicting husband and wife, they may join. *Per Croke, Cro. Car. 553. Jon. 440.* Or, the husband alone shall have the action. *Semb. Cro. Car. 553.*

This I take it for granted is law.

So, for a malicious presentment in the spiritual court. *Semb. 2 Cro. 355.*

In an action of covenant, for non-payment of rent of land, the inheritance of the wife, they may or may not join, at their election. *Stra. 229.*

IV. What Action shall be against Husband and Wife.

Actions real, for the land of the wife ought to be against the husband and wife.

So, debt for rent, upon a lease for life, or years, made to husband and wife, shall be against both.

So, an action for a *tort*, done by the wife after marriage, shall be against husband and wife: As, *trover* upon a conversion by the act of the *feme covert* only.

An action, which charges the husband for an act of his wife, done before coverture, shall be against both: As, *trover* upon a conversion by the wife before marriage. Or, *detinue* for goods taken by the wife before coverture.

So, debt for rent, upon a lease at will to the wife, *dum sola*. Or, upon a lease for years, where the rent incurred before coverture.

But, an action for a *tort*, done by the husband and wife jointly, shall be against the husband alone; for the whole shall be intended to be the act of the husband: As, *trover* of goods, and conversion to their use. *Vide Infra.* In this case, the conversion is the gift of the action.

So, an action upon an *assumpsit* by husband and wife, against both, is bad; for *quoad* the wife, the promise is void. Though it be for vestments bought by the wife.

So,

So, debt lies against the husband alone, for rent incurred during the coverture, upon a lease to the wife, *dum sola*. Or, upon a lease which the wife hath as executrix, or administratrix.

If an action be brought by, or against husband and wife, where it ought to be by, or against the husband alone, it will be error, or it may be moved in arrest of judgment.

So, if it be by the husband and wife, for a matter in which they ought to join, and also for a matter for which the husband ought to sue alone. *Vide Action, Div. VI.*

If there be an action by husband and wife, for a battery of both, (which would be bad, for the wife cannot join for the battery of the husband), and as to the husband, the defendant is found *not guilty*, it will be good.

So, if the damages are found several for the battery of the husband, and the battery of the wife, and the husband release the damages for his own battery.

So, if there be an action by husband and wife for a battery of the wife, and taking the vestments, or goods of the husband with her, and the defendant is found *not guilty* of taking the goods. *Vide Action, Div. VI. 1 Com. Dig. 579, 80.*

If husband and wife are arrested for a debt of the wife *dum sola*, both put in bail above, and both are rendered in discharge, she shall be discharged on *superfedeas* on common appearance. *Barnes, 96.*

In an action against husband and wife, the husband shall give bail for himself and his wife. In debt, the action ought to be against them in the *debet and detinet*, though it be for the debt of the wife, *dum sola*.

A declaration against husband and wife, is bad, if the process was against the husband alone. If the conversion be alledged to *their* use. *Sed infra.*

Yet, a suggestion of a *devastavit* by husband and wife executrix, that they wasted and converted to *their* use, is good; for the word *wasted* is the only material word, and that both may do. *5 Com. Dig. 168.*

Trespass against husband and wife for taking goods, is good, though the conversion is laid to be to *their* use; for the conversion is not the gift of the action, as in *trover*. *Andr. 242.*

If husband and wife are arrested for her debt, whilst sole, she shall be discharged, and he lie, until he puts in bail for both. *Str. 1272.*

Plea,

Plea, &c.

In action against husband and wife, both ought to join in plea, and therefore if the wife alone comes and pleads, there shall be a repleader. So, if the entry be that the husband and wife come and defend the force and injury, &c. And the aforesaid *wife* says, she is not guilty thereof, 'Tho' the *tort* be supposed by the wife only: As, in battery against husband and wife, for a battery by the wife.

So, in *assumpsit* against husband and wife, upon a promise of the wife, *dum sola*. So, in an action for words spoken by the wife only.

So, in battery against the husband and wife and others, if the wife and others plead, *not guilty*, and the husband *son assault*, it will be bad. 5 *Com. Dig.* 168. as to last point, cites. *R. 1. Brownl.* 197. It was, because the wife pleaded, without the husband,

So, in battery against husband and wife, if the husband justifies in aid of his wife, and the wife only pleads, *son assault*, it is bad. *Com. Dig. ibid.* cites, *R. 2 Cro.* 239. The feme cannot plead by herself,

So, they ought to join in the averment, and this they are ready to verify. *Semb. Cro. Car.* 594.

But, where the *tort* is supposed by the wife alone, tho' both join in pleading; yet the issue ought to be, that the wife is not guilty, and therefore, in trover upon a conversion by the wife, if the husband and wife plead that *they* are not guilty, it is bad, and a repleader shall be awarded, for it ought to be that *she* is not guilty.

Yet in debt against them, they may plead that *they* owe nothing.

If the verdict finds that the wife alone is guilty, it aids the plea.

Id an action against husband and wife, if it be only for the wife's act, and she is found guilty, both shall be in *misericordia*: As, for words by the wife. In trover for a conversion supposed by the wife.

So, if the wife is executrix, or administratrix, and there is judgment *de bonis testatoris si, &c. et si non, tunc custag' de bonis suis propriis*, tho' properly the wife has no goods; for she will be liable after the death of her husband. 5 *Com. Dig.* 168, 9.

The court cannot give leave to the wife to plead separately from her husband, even where her estate is settled on her, and confirmed by order of the house of lords to her separate use, subject to demands on the husband on her account, she must plead in the name of husband and wife, and if he disavows, enforce the order of the lords. *B. R. H.* 101.

If *A* and *B.* are sued as husband and wife, *A.* cannot plead *ne unques accouple en loyal Matrimony*, for the legality of marriage is not triable in personal actions, because a husband *de facto* is liable to his wife's debts. *Andr.* 227.

In *trover*, if there is judgment and execution against both, the court will not discharge the wife, unless there is fraud and collusion between the plaintiff and the husband to keep her in custody. *Stra.* 1167.

So, in battery by defendant's wife, of plaintiff's wife, the court will not discharge the wife, who, only, is in execution, if it appears there is no design to screen the husband. *Stra.* 1237. *Wilf.* 149.

If husband and wife are taken in execution, the wife cannot be discharged. *Barnes*, 203.

V. What Actions the Husband shall have by his surviving.

If a *feme covert* die, and the husband survive, he shall have an action for any thing incurred during the coverture: As, the husband shall have debt after his wife's death, for rent incurred to the wife during coverture. 1 *Rol.* 352. *l.* 5.

So, if the wife had a manor, the husband, after her death, shall have debt for a relief, which fell during the coverture. *Ibid.* *l.* 11.

So, if the wife hath judgment *dum sola*, and thereupon the husband and wife sue out a *scire facias*, and have judgment, but before execution the wife dies, the husband, who survives, shall have a *scire facias* upon it. *R.* 1 *Salk.* 116. *Skin.* 682. So the husband alone may have debt upon it. 3 *Mod.* 189.

So, by the *stat.* 32 H. 8. c. 37. If the wife hath a rent-charge for life, which is in arrear before, and after the coverture, the husband surviving shall have debt for all the arrears. *R.* 1 *Andr.* 47.

But, if husband and wife recover judgment in debt, in right of the wife, as executrix to *A.* and the wife dies; the husband shall not have execution upon this judgment, tho' he

he be privy; for the debt belongs to the succeeding executor, or administrator of *A.* *R. 1 Rol. 889. l. 10.*

VI. *What the Wife, if she survives.*

If husband and wife recover in a real action, in right of the wife, and the husband dies, the wife shall have execution, and not the executor of the husband.

So, if they recover in a *quare impedit*, and the husband dies, the wife shall have the writ to the bishop, and execution for the damages. *1 Rol. 889. l. 50.*

So, in an assise, or other real action, if the husband and wife recover, and the husband dies; the wife shall have execution for the damages, as well as for the land. *1 Rol. 889. l. ult. 890. l. 3.*

So, the wife surviving shall have trespass, for a trespass upon her land during the coverture. *R. Pal. 313.* Or, for a trespass, part in the life of the husband, part afterwards. *Ibid.*

VII. *What Actions shall be against the Husband, if he survives.*

If a woman, lessee for life, takes husband, and dies, the husband shall be charged for rent incurred during the coverture; for he takes the profits of the land, out of which the rent issues. *1 Rol. 351. l. 35.* So, for the rent incurred during the coverture, upon a lease for years. *R. Ray. 6. 1 Lev. 25.*

So, if the husband after the death of his wife, undertakes to pay for goods sold to her as a *feme sole* trader, he shall be charged; for he is intitled to administration. *1 Com. Dig. 581. cites R. cont. Show. 184.* And I am inclined to think it is not law.

So, if the husband and wife, upon payment of a sum in gross, undertake to discharge an annuity to the wife, and the wife die, an *assumpsit* lies upon this promise against the husband surviving. *R. Pal. 312, 313.*

If there be judgment against husband and wife upon a bond of the wife, who dies before execution; the husband shall be charged. *Agr. 1 Sid. 337. Lut. 671.*

So, if there be judgment against an husband and wife executrix, or administratrix, upon a *devastavit* during the coverture,

coverture, and the wife dies, the husband shall be charged. *Cro. Car.* 519. *R.* 1 *Sid.* 337.

If there be judgment against the wife *dum sola*, and a *scire facias* upon it against husband and wife, and judgment, but before execution the wife dies, yet a *scire facias* afterwards lies against the husband who survives. *R.* 3 *Mod.* 186. 1 *Salk.* 116. *Lut.* 671. *Carth.* 30.

VIII. What not.

The husband shall not be charged after the death of his wife, for a debt due from the wife before coverture; for it was only in action.

So, though there is judgment against a woman *dum sola*, who afterwards takes husband and dies, the husband shall not be charged upon this judgment.

So, if there be judgment against husband and wife, as executrix, *ut de bonis testatoris*, and upon a *fieri facias* thereupon, the sheriff returns a *devastavit*, and the wife dies before judgment against them *de bonis propriis*, the husband shall not be charged. 1 *Com. Dig.* 581. cites, as to the last point, *Dub.* 1 *Rol.* 351. *l. ult.* *Semb.* 3 *Mod.* 189. *Et qu. de hoc?* Roll says execution may issue against the husband.

So, if a *feme* executrix, or administratrix, takes husband, and they commit a *devastavit*, but the wife dies before judgment against them, the husband shall not be charged.

So, if the husband of a lessee for life does waste, and the wife dies before a recovery against them, the husband shall not be charged. 1 *Com. Dig.* 581. cites, as to the last point. 1 *Rol.* 351. *l. 41.* *D. Lut.* 674. *cont.* 10. *H.* 6. 12. *Sed qu.* if a special action upon the case, in nature of an action of waste, would not lie against him?

So, if there be judgment against husband and wife as executrix, and the wife dies, debt does not lie against the husband upon a suggestion, that he converted the goods of the testator to his own use. *R. Lut.* 674.

So, if there be a decree in equity against husband and wife executrix, to be paid out of the assets of the testator, and the wife dies, there shall be no execution against the husband, without reviving against the administrator *de bonis non*, &c. 2 *Ver.* 195.

PROCEEDING AND PLEADING IN ACTIONS BY AND AGAINST AN INFANT.

1. In an Action by an Infant.

Must sue by Guardian or Prochein Amy.

If an action be commenced by an infant, he must sue by guardian or *prochein amy*, as the court pleases. And the king may appoint him a general guardian. So he may appoint him two or three to be guardians jointly or severally, or to appoint others under them.

A *prochein amy* shall be appointed by virtue of the *stat. W. 2. 13 Ed. 1. c. 15.* which enacts, that if an infant, who would sue, be *esloigned* that he cannot do so in person, his *prochein amy* may be admitted to sue for him. *2 Cro. 641.* and was appointed before in assise by the *stat. W. 1. c. 48.*

And this case extends to all cases, where an infant sues, though he be not *esloigned*.

So, he ought to appear to be an infant, for if he sues at full age by guardian or *prochein amy*, it is error.

If an infant sues or defends by a guardian, such guardian must have a warrant. And therefore such guardian must be admitted by the court. So must a *prochein amy*. But a *prochein amy* need not have a warrant.

If he sues by guardian, without saying *by the court here specially admitted*, it is error. And the defendant need not plead till the plaintiff shews the rule for his admittance by guardian or *prochein amy*.

If the court appoints a guardian for an infant, he ought to be in person in court. *5 Com. Dig. 170, 1.* as to last point cites *2 Leo. 189.* *Sed qu.* if this is not now dispensed with?

If he has not not a guardian by *foeage*, &c. the court may assign an officer of the court to be guardian, or *prochein amy* for him.

If the guardian by *foeage*, or by testament acts, no other shall be assigned, unless he misbehaves himself. *5 Com. Dig. 171.*

But, if the declaration says, *by the court specially admitted*, it is sufficient, tho' there be no admission on the roll. *R. in B. R. where there are many precedents acc. which make the law*

law in such case. 4 Co. 53. b. for it shall not be error; but only a misdemeanor in the agent employed in the cause. P. 21 Car. 2. Pr. Reg. 38. So in C. B. R. 1 Sid. 173. And if there was an admission, though no entry thereof on the record, it shall be amended. R. Cro. Car. 86. Hut. 92. 1 Lev. 224.

If an infant sues by guardian or *prochein amy*, he cannot afterwards remove his guardian, or disavow his *prochein amy*. F. N. B. 27 K. But an infant may have a writ out of Chancery to remove him. *Ibid.* M. Or the court may remove him at their discretion. *Ibid.*

As, in an appeal by an infant, the court may discharge the guardian assigned, and discontinue the suit. R. 1 Rol. 288. D.

If an infant sues by attorney, it may be pleaded in abatement. And this since the *stat.* 21 Jac. c. 13. which aids a suit by him, by attorney after verdict. 2 Saund. 213.

If he sues, without saying by whom, it is error, as it shall be intended in proper person. So, if he commences a suit by attorney, and afterwards proceeds by guardian. Or commences by guardian, and afterwards, during his infancy proceeds by attorney; for this will be a discontinuance. So, though he sues in another right, as executor, or administrator. 5 Com. Dig. 171. cites various authorities, *pro et con.* But this seems to be the law.

So, though he sues a writ of error.

But, if an infant sues by guardian, and after his full age proceeds by attorney, it is well. 5 Com. Dig. 171.

So, by the *stat.* 21 Jac. c. 13. In ejectment or personal actions; if an infant sues by attorney, it shall be aided after verdict.

And by the *stat.* 4 & 5 Ann. c. 16. After judgment by confession, *nil dicit*, *non sum informatus*, or after writ of inquiry executed.

So, if several sue jointly, and some are within age, and some of full age, and all appear by attorney, it is no error: for those of full age may make an attorney for all. 5 Com. Dig. 172. cites several authorities, *pro et con.* Et *Qu.* if this is law?

Husband and wife may sue by attorney, though the wife is an infant. D. 2 Saund. 213. So several executors or administrators may sue by attorney, though some are within age; for all represent the person of the testator, and sue in another right. 5 Com. Dig. 172.

So,

So, in replevin, if the defendants as bailiffs to *A.* make conuſance by attorney, and one is an infant, it is no error; for they are in the nature of plaintiffs, and make conuſance in another right. *Dub. 3 Mod. 248. R. per 3 J. Holt. cont. Sho. 170.* So, if the defendants avow in their own right, and one is an infant. *Semb. cont. Tel. 58. 5 Com. Dig. 172. Vide infra, No. 2.*

A general admission of *prochein amy*, to preſecute and defend all ſuits, is ſufficient. *Stra. 304.*

Plaintiff's attorney muſt give defendant's attorney notice of the guardian's place of abode. *1 Wiſl. 246.*

2. In an Action againſt an Infant.

Muſt defend by Guardian.

In an action againſt an infant, he muſt appear only by guardian, for he has not knowledge of his own affairs, or to chooſe a man to plead well for him, and may have an action againſt his guardian, if he loſes by miſpleading. *R. ſepius. 2 Rol. 287. l. 10, 20. Dy. 104. b.*

And therefore, if he appears by *prochein amy*, it is bad.

So, in all actions real, perſonal, or mixt, againſt an infant, if he appears by attorney, it is error. Though there was not any warrant of attorney upon record. Though he be ſued in another right, as executor, or adminiſtrator.

So, if ſeveral defendants appear by attorney, and one is an infant, it is error, and judgment ſhall be reverſed againſt all.

So, if huſband and wife, being vouched in a common recovery, appear by attorney, and the wife is within age. So, in a perſonal action, if huſband and wife appear by attorney, when the wife is within age.

So, in replevin, if two avow by attorney, and one is an infant. *R.* that it ſhall not be aſſigned for error, for it was pleadable in abatement. *1 Salk. 93. 205.*

And, it is ſufficient, if he was an infant at the time of the judgment, though he arrived at full age before error brought. And ſuch error ſhall be tried by the country, and not by inſpection.

If an infant, defendant, appears, and pleads by guardian, regularly he ought to be admitted ſuch before he appears or pleads. But, if he is not admitted, it is not error, but only

a misdemeanor in the attorney. And regularly the admission ought to be *ad defendendum*; for if the guardian for the defendant is admitted *ad prosequendum*, it is bad. 5 Com. Dig. 172, 3. *Sed vide infra*.

Yet, if a guardian is admitted *ad sequendum*, it is good; for this may be applied indifferently to the plaintiff or defendant. *R. in a common recovery*. 2 Sand. 95. 1 Sid. 446.

Or, *ad prosequendum*; for he prosecutes his defence. *R. 2 Mod. Ca. 25*.

In an action against a defendant, who is an infant, the plaintiff may declare, as against another person; for if he is not chargeable in respect of infancy, the defendant shall plead, that he is within age. And therefore, by his declaration he need not alledge, that the goods sold to him, &c. were necessaries; for, after nonage pleaded, the plaintiff may shew in his replication that it was for necessaries. 5 Com. Dig. 173.

If in an action against an infant, he demurs, he may waive it in the same term, and plead to issue. *R. 2 Bulst. 69*.

If an attorney undertakes to appear for an infant, and enters it *by attorney*, it may be amended, and made *by guardian*. *Stra. 514*. But, if there is not an express undertaking to appear, it cannot be done. *Stra. 445*.

An infant executor, though joined with another of full age, cannot be sued by attorney, though they might sue. *Stra. 783*.

If an infant does not name a guardian to appear by, the court will give leave to the plaintiff to do it. *Stra. 1076*.

If infant served with process to appear by attorney, appears by attorney, the court will make a rule for him to appear by guardian, or plaintiff to be at liberty to name one to appear and defend. *Barnes, 418*.

Plaintiff's attorney should apply to defendant to name a guardian, and if he does not in six days, then apply to the court to oblige him to do it. 2 Wils. 50.

And plaintiff has proceeded to judgment against an infant, as if he was of age, he cannot have the appearance in person struck out, and have appearance by guardian entered. *Barnes, 413*.

APPENDIX OF PRECEDENTS.

A Record of Proceedings in Ejectment in B. R. by Original, Verdict for Plaintiff, Motion in Arrest of Judgment, with Judgment for the Plaintiff.

PLEAS before the Lord the King at *Westminster*, of the Term of Saint *Hilary*, in the 29th Year of the Reign of the Lord, *George the Second*, by the Grace of God, of *Great-Britain, France and Ireland*, King, Defender of the Faith, &c.

Berks *fc.* WILLIAM MILLS late of *S.* in the county of *Berks* afore said, gentleman, was attached to answer *Samuel Rickards* of a plea (wherefore with force and arms he entered into one messuage, with the appurtenances, in *Sutton*, which *J. R. Esq.* demised to the said *Samuel*, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said *Samuel*, and against the peace of our lord the now king, &c.

(a) And thereupon the said *Samuel*, by *A. B.* his attorney complain, that whereas the said *J. R.* on the 1st day of *October*, in the 29th year of the reign of our said lord the king, at *S.* afore said, had demised to the said *Samuel*, the tenement afore said, with the appurtenances, to hold the said tenement with the appurtenances to the said *Samuel* and his assigns, from the feast of *Saint Michael* the archangel, then last past, to the end and term of seven years, from thence next following, and fully to be complete and ended; by virtue of which demise, the said *Samuel* afterwards, to wit, on the said 1st day of *October*, in the year afore said, entered into the said tenement with the appurtenances, and was thereof possessed, and being so thereof possessed, the said *William* afterwards, that is to say, on the said day and year last afore said, with force and arms, that is to say, with swords and staves, &c. entered into the said tenement with the appurtenances, which the said *J. R.* demised to the said *Samuel*, in form afore said, for the term afore said, which is not yet expired, and ejected him out of his said farm; and other wrongs to

(a) Declaration or count.

T 2

him

him did, to the great damage of the said *Samuel*, and against the peace of our said lord the king, wherefore the said *Samuel* saith that he is injured, and hath sustained damage to the value of 20l. and * therefore he brings his suit [and good proof] (a) AND the said *William* by C. N. his attorney, comes and defends the force and injury when [and where it shall behove him] and saith (b) that he is no wise guilty of trespass aforesaid, in manner and form as the said *Samuel* above complains against him, and of this he puts himself upon the country, (c) and the said *Samuel* doth likewise the same. (d) THEREFORE let a jury thereupon come before the lord the king on the octave of the purification of the blessed virgin *Mary*, wheresoever he shall then be in *England*, who neither [are of kin to the said *Samuel* nor to the said *William*] to recognise [whether the said *William* be guilty of the trespass aforesaid] because as well [the said *William* as the said *Samuel*, between whom the difference is, have put themselves on the said jury] the same day is there given, to the parties aforesaid. (e) AFTERWARDS the process therein being continued, between the said parties, of the plea aforesaid, by the jury is put between them in respite, before the lord the king, until *the day of Easter, in 15 days*, wheresoever the said lord the king shall then be in *England*, (f) unless the justices of the lord the king assigned to take assizes in the county aforesaid, shall have come before that time, to wit, on *Monday the 8th day of March*, at *Reading* in the said county, by the form of the statute [in that case provided] by reason of the default of the jurors [summoned to appear as aforesaid] at which day before the lord the king at *Westminster*, come the parties aforesaid, by their said attorneys, and the aforesaid justices of assize before whom the said jury came, sent here their record before them, had in these words, viz. (g) Afterwards at the day and place within contained before *Heneage Legge, Esq;* one of the barons of the Exchequer of the lord the king, and Sir *John Eardley Wilmot*, knight, one of the justices of the said lord the king, assigned to hold pleas before the king himself, justices of the said lord the king assigned to take assizes,

* The various passages inclosed in brackets, are in general now supplied by *& cas.*

(a) Defence. (b) Plea not guilty. (c) Issue (d) *Venire* awarded. (e) Respite for default of jurors. (f) *Nisi prius*. (g) *Postea*.

in

in the county of *Berks*, according to the form of the statute [in that case provided] came as well the within *Samuel Rickards*, as the within written *W. Mills* by their attornies within contained, and the jurors of the jury, whereof mention is within made, being called, certain of them, to wit, *C. H. J. H. P. G. H. C. W. B* and *F. O.* come and are sworn upon that jury, and because the rest of the jurors of the same jury did not appear, (a) therefore others of the by-standers, being chosen by the sheriff at the request of the said *Samuel Rickards*, and by the command of the justices aforesaid, are appointed, and whose names are affixed to the panel within written, according to the form of the statute in such case made and provided, which said jurors so appointed anew, to wit, *R. B. T. S. C. P. E. H. S. R.* and *D. P.* being likewise called, came, and (together with the other jurors aforesaid, before impannelled, and sworn,) being elected, tried, and sworn, to speak the truth of the matter within contained, upon their oath, say, (b) that the aforesaid *William Mills* is guilty of the trespass within written, in manner and form, as the aforesaid *Samuel Rickards* within complains, against him, and they assess the damages of the said *Samuel Rickards* by him sustained, on occasion of that trespass, besides his costs and charges, which he hath been put unto, about his suit in that behalf, to twelve pence, and for those costs and charges to forty shillings; (c) WHEREUPON the said *Samuel Rickards*, by his attorney aforesaid, prayeth judgment against the said *William Mills*, in and upon the verdict aforesaid, by the jurors aforesaid, given in the form aforesaid, and the said *William Mills*, by his attorney aforesaid, saith, that the court here, ought not to proceed to give judgment, upon the said verdict, and prayeth that judgment against him the said *William Mills*, in and upon the verdict aforesaid, by the jurors aforesaid, given in the form aforesaid, may be stayed by reason that the said verdict is insufficient, and erroneous, and that the same verdict may be quashed, and that the issue aforesaid may be tried anew, by other jurors, to be afresh impannelled: And because the court of the lord the king here, is not yet advised of giving their judgment, of and upon the premises; (d) therefore day thereof is given, as well to the said *Samuel Rickards*, as to the said *William Mills*, before the lord the king, until the *Morrow of the Ascension of our Lord*, wherefo-

(a) *Tales de circumstantibus*

(b) Verdict for the plaintiff.

(c) Motion in arrest of judgment.

(d) Continuance.

ever the said lord the king shall then be in *England* to hear their judgments of and upon the premises, for that the court of the lord the king, is not yet advised thereof: at which day, before the lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid, upon which the record, and matters aforesaid, having been seen, and by the court of the lord the king, now here, fully understood, and all and singular the premisses, having been examined, and mature deliberation being had thereupon, (a) for that it seems to the court of the lord the king, now here, that the verdict aforesaid, is in no wise insufficient, or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had, of the issue aforesaid. (b) THEREFORE IT IS CONSIDERED, that the said *Samuel* do recover against the said *William*, his term yet to come, of and in the said tenement, with the appurtenances, and the damages assessed by the jury, in form aforesaid; and also (c) *twenty-seven pounds six shillings and eight pence*, for his costs and charges aforesaid, by the court of the lord the king here awarded to the said *Samuel*, with his assent by way of increase, which said damages in the whole amount to *twenty-nine pounds seven shillings and eight pence* (d) and let the said *W.* be taken* [until he maketh fine to the lord the king] AND HEREUPON the said *Samuel*, by his attorney aforesaid, prayeth a (e) writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his term aforesaid, yet to come, of, and in the tenement aforesaid, with the appurtenances; and it is granted unto him, (f) returnable before the lord the king, on the *Morrow of the Holy Trinity*, wheresoever he shall then be in *England*; at which day before the lord the king at *Westminster*, cometh the said *Samuel*, by his attorney aforesaid, and the sheriff, that is to say, Sir *T. K.* knight, now returneth, that he, by virtue of the writ aforesaid, to him directed on the ——— day of ———, last past, did cause the said *Samuel* to have

(a) Opinion of the court.

(b) Judgment for the plaintiff.

(c) Costs.

(d) *Capiatur pro fine.*

* This is mere form, but it is the antient form. By 5 *W. & M. c.* 12. the process for the *capiatur* fine in the several courts at *Westminster*, is taken away; and in lieu, the plaintiff, upon signing judgment, pays the officer six shillings and eight pence.

(e) Writ of possession.

(f) And return.

his

his possession, of his term aforesaid, yet to come, of and in the tenement aforesaid, with the appurtenances, as he was commanded, &c. &c.

Proceedings in an action of Debt in the Common Pleas, removed into B. R. by Writ of Error.

1. Original.

(a) GEORGE the Second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: Command *William Mills*, late of *B.* in your county, gentleman, that justly, and without delay, he render to *Samuel Rickards*, two hundred pounds, which he owes him, and unjustly detains, as he saith, and unless he shall so do, and if the said *Samuel* shall make you secure, of prosecuting his claim, then summon, by good summoners, the aforesaid *William*, that he be before our justices at *Westminster*, on the *Octave of St. Hilary*, to shew wherefore he hath not done it, and have you there, then, the summoners, and this writ. WITNESS ourselves at *Westminster*, the twenty-eight day of *November*, in the 28th year of our reign.

(b) Pledges of pro-	} <i>J. Doe</i> Summoners of the	} <i>R. M.</i>		
secution.			} <i>R. Roe</i> within named	} <i>H. J.</i>
	<i>Wm. Mills.</i>			

2. Process.

(c) GEORGE the Second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: (d) Put by gage and safe pledges, *Wm. Mills*, late of *B.* in your county, gentleman, that he be before our justices at *Westminster*, on the *Octave of the Purification of the Blessed Virgin Mary*, to answer to *S. Rickards*, of a plea, that he render to him, 200l. which he owes him, and unjustly detains, as he saith, and to shew wherefore he was not before our justices at *Westminster*, on the *Octave of St. Hilary*, as he was summoned; and have there, then, the names of the pledges, and this writ. Witness Sir *John Willes* knight, at *Westminster*,

(a) *Præcipe.*
(d) *Pone.*

(b) Sheriff's return.

(c) Attachment.

the

the *twenty-third* day of *January*, in the 28th year of our reign.

- (a) The within named *W. Mills* { *E. L.*
is attached by pledges. { *R. T.*

(b) GEORGE the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: We command you, that you distrain *W. Mills*, late of *B.* in your county, gentleman, by all his lands and chattels, within your bailiwick, so that neither he, nor any one, through him, may lay hands on the same, until you shall receive from us, another command thereupon, and that you answer to us, of the issues of the same, and that you have his body, before our justices at *Westminster*, from the day of *Easter*, in *fifteen days*, to answer to *Samuel Rickards*, of a plea, that he render to him 200*l.* which he owes him, and unjustly detains, as he saith; and to hear his judgment, for his many defaults. WITNESS Sir *John Willes*, knight, at *Westminster*, the *twelfth* day of *February*, in the 28th year of our reign.

(c) The within named *W. Mills*, hath nothing in my bailiwick, whereby he may be distrained.

(d) GEORGE the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: We command you, that you take *W. Mills*, late of *B.* in your county, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body, before our justices, at *Westminster*, from the day of *Easter* in *five weeks*, to answer to *Samuel Rickards*, gentleman, of a plea, that he render to him, 200*l.* which he owes him, and unjustly detains, as he saith, and whereupon you have returned, to our justices at *Westminster*, that the said *William* hath nothing in your bailiwick, whereby he may be distrained. And have you there, then, this writ: WITNESS Sir *John Willes*, knight, at *Westminster*, the *sixteenth* day of *April*, in the 28th year of our reign.

(a) Sheriff's return

(b) *Disfringas.*

(c) Sheriff's return, *nihil.*

(d) *Capias ad respondendum.*

(a) The

(a) The within named *William Mills*, is not found in my bailiwick.

(b) *GEORGE* the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Berkshire*, greeting: We command you, that you take *William Mills*, late of *B.* in the county of *Oxford*, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body, before our justices at *Westminster*, on the *Morrow of the Holy Trinity*, to answer to *Samuel Rickards*, gentleman, of a plea, that he render to him 200*l.* which he owes him, and unjustly detains, as he saith, and whereupon our sheriff of *Oxfordshire*, hath made a return, to our justices at *Westminster*, at a certain day now past, that the aforesaid *William* is not found in his bailiwick; and thereupon it is testified in our said court, that the aforesaid *William* lurks, wanders, and runs about, in your county; and have you there, then, this writ. Witness *Sir John Willes*, knight, at *Westminster*, the 7th day of *May*, in the 28th year of our reign.

(c) By virtue of this writ to me directed, I have taken the body of the within named *W. Mills*, which I have ready, at the day and place within contained, according, as by this writ it is commanded me.

Or, upon the return of *non est inventus*, upon the first *capias*, the plaintiff may sue out an alias and a pluries, and thence proceed to outlawry, thus:

(d) *GEORGE* the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: We command you, as formerly we commanded you, that you take *William Mills*, late of *B.* in your county, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body, before our justices at *Westminster*, on the *Morrow of the Holy Trinity*, to answer to *Samuel Rickards*, gentleman, of a plea, that he render to him, 200*l.* which he owes him, and unjustly detains, as he saith, and have you there, then, this writ. Witness *Sir John Willes*, knight, at *Westminster*, the 7th day of *May*, in the 28th year of our reign.

(e) The within named *William Mills* is not found in my bailiwick.

(a) Sheriff's return, *non est inventus*.

(b) *Testatum capias*.

(c) Sheriff's return, *cepi corpus*. (d) *Alias capias*. (e) Sheriff's return, *non est inventus*.

GEORGE

(a) GEORGE the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: We command you, as we have more than once commanded you, that you take *William Mills*, late of *B.* in your county, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body, before our justices at *Westminster*, from the day of the *Holy Trinity* in three weeks, to answer to *Samuel Rickards*, gentleman, of a plea, that he render to him, 200*l.* which he owes him, and unjustly detains, as he saith; and have you there, then, this writ. Witness *Sir John Willes*, knight, at *Westminster*, the 13th day of *May*, in the 28th year of our reign.

(b) The within named *William Mills*, is found in my bailiwick.

(c) GEORGE the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting. We command you, that you cause *William Mills*, late of *B.* in your county, gentleman, to be required from every county court, to county court, until, according to the law and custom of our realm of *England*, he be outlawed, if he doth not appear; and if he doth appear, then take him, and cause him to be safely kept, so that you may have his body, before our justices at *Westminster*, on the *Morrow of All Souls*, to answer to *Samuel Rickards*, gentleman, of a plea, that he render to him, 200*l.* which he owes him, and unjustly detains, as he saith; and whereupon you have returned to our justices, at *Westminster*, from the day of the *Holy Trinity* in three weeks, that he is not found in your bailiwick, and have you there, then, this writ. Witness *Sir John Willes*, knight, at *Westminster*, the 18th day of *June*, in the 29th year of our reign.

(d) By virtue of this writ, to me directed, at my county court, held at *Oxford*, in the county of *Oxford*, (e) on *Thursday* the 21st day of *June*, in the 29th year of the reign of our lord the king within written, the within named *William Wills*, was required the first time, and did not appear; and at my county court held at *Oxford* aforesaid, (f) on *Thursday* the 24th day of *July*, in the year aforesaid, the said *William Wills*, was required the second time, and did not appear;

(a) *Pluries capias.*

(b) Sheriff's return, *non est inventus.*

(c) *Exigifacias.*

(d) Sheriff's return.

(e) *Primo exactus.*

(f) *Secundo exactus.*

and

and at my county court, held at *Oxford* afore said, (a) on *Thursday* the 21st day of *August*, in the year afore said, the said *William Mills*, was required the third time, and did not appear: And at my county court, held at *Oxford* afore said, (b) on *Thursday* the 18th day of *September*, in the year afore said, the said *William Mills*, was required the fourth time, and did not appear; and at my county court, held at *Oxford* afore said, (c) on *Thursday* the 16th day of *October*, in the year afore said, the said *William Mills*, was required the fifth time, and did not appear: (d) Therefore, the said *W. Mills* by the judgment of the coroners of the said lord the king, of the county afore said, according to the law, and custom of the kingdom of *England*, is outlawed.

(e) *GEORGE* the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: Whereas, by our writ, we have lately commanded you, that you should cause *William Mills*, late of *B.* in your county, gentleman, to be required, from county court, to county court, until, according to the law, and custom of our realm of *England*, he should be outlawed, if he did not appear; and if he did appear, that you should take him, and cause him to be safely kept, so that you might have his body, before our justices at *Westminster*, on the *Morrow of All Souls*, to answer to *Samuel Rickards*, gentleman, of a plea, that he render to him, 200*l.* which he owes him, and unjustly detains, as he saith; Therefore we command you, by virtue of the statute in the 31st year of the lady *Elizabeth*, late queen of *England*, made and provided, that you cause the said *William Mills*, to be proclaimed upon three several days, according to the form of that statute, (whereof one proclamation shall be made, at or near the most usual door of the church, of the parish wherein he inhabits,) that he render himself unto you, so that you may have his body before our justices, at *Westminster*, at the day afore said, to answer the said *Samuel Rickards*, of the plea afore said, and have you there, then, this writ. Witness, *Sir John Willes*, knight, at *Westminster*, the 18th day of *June*, in the 29th year of our reign.

(f) By virtue of this writ to me directed, at my county court, held at *Oxford*, on *Thursday* the 26th of *June*, in the

(a) *Tertio exactus.* (b) *Quarto exactus.* (c) *Quinto exactus.*
 (d) *Ideo utlagatus,* (e) Writ of Proclamations. (f) Sheriff's return, *proclamare feci.*

29th year of the reign of our Lord the king, within written, I caused to be proclaimed, the first time; and at the general quarter sessions of the peace, held at *Oxford* aforesaid, on *Tuesday* the 15th day of *July*, in the year aforesaid, I caused to be proclaimed the second time, and at the most usual door of the church of *Burford*, within written, on *Sunday* the third day of *August* in the year aforesaid, immediately after divine service, one month at the least, before the within named *William Wills*, was required the fifth time, I caused to be proclaimed the third time, that the said *William Wills* should render himself, unto me, as within it is commanded me.

(a) *GEORGE* the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Berkshire*, greeting: We command you, that you omit not, by reason of any liberty of your county, but that you take *William Wills*, late of *B.* in the county of *Oxford*, gentleman, being outlawed, in the said county of *Oxford*, on *Thursday* the 16th day of *October*, last past, at the suit of *Samuel Rickards*, gentleman, of a plea of debt, as the sheriff of *Oxfordshire*, aforesaid, returned to our justices, at *Westminster*, on the *Morrow of All Souls*, then next ensuing, if the said *William Wills* may be found in your bailiwick, and him safely keep, so that you may have his body before our justices, at *Westminster*, from the day of *St. Martin* in fifteen days, to do, and receive, what our court shall consider concerning him, in this behalf. Witness *Sir John Willes*, knight, at *Westminster*, the 6th day of *November*, in the 29th year of our reign.

(b) By virtue of this writ to me directed, I have taken the body of the within named *William Mills*, which I have ready, at the day, and place, within contained, according as by this writ is commanded me.

* Bill of *Middlesex* and latitat thereupon in the court of King's-Bench.

(c) *Middlesex* } THE sheriff is commanded, that he take
to wit. } *William Mills*, gentleman, and *John Doe*,
if they may be found in his bailiwick, and safely keep them,

(a) *Capias utlagatum.*

(b) Sheriff's return, *cepi corpus.*

* This, and the two following writs, are the usual process, to compel an appearance, in the courts of King's Bench, and Exchequer; in which the practice of those courts, does principally differ, from the court of Common Pleas; but the subsequent stages of proceeding, are nearly alike in them all.

(c) Bill of *Middlesex* in trespass.

so that he may have their bodies before the lord the king at *Westminster* on *Wednesday next after fifteen days of Easter*, to answer to *Samuel Rickards*, gentleman, of a plea of trespass, (a) * [AND ALSO to a bill of the said *Samuel*, against the aforesaid *William*, for 200*l.* of debt, according to the custom of the court, of the said lord the king, before the king himself, to be exhibited] and that he have there, then, this precept.

(b) The within named *William Mills*, and *John Doe*, are not, nor is either of them found in my bailiwick.

(c) *GEORGE* the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth, to the sheriff of *Berkshire*, greeting: Whereas we lately commanded our sheriff of *Middlesex*, that he should take *William Mills*, and *John Doe*, if they might be found in his bailiwick, and safely keep them, so that he might have their bodies before us, at *Westminster*, at a certain day now past, to answer unto *Samuel Rickards*, gentleman, of a plea of trespass, (d) [AND ALSO, to a bill of the said *Samuel* against the aforesaid *William* and *John*, for 200*l.* of debt, according to the custom of our court, before us, to be exhibited] and our said sheriff of *Middlesex*, at that day returned to us, that the aforesaid *William* and *John* were not, nor was either of them found in his bailiwick; whereupon, on the behalf of the aforesaid *Samuel*, in our court, before us, it is sufficiently attested, that the aforesaid *William* and *John*, lurk, and run about in your county: THEREFORE, we command you, that you take them, if they may be found in your bailiwick, and safely keep them, so that you may have their bodies before us, at *Westminster*, on *Tuesday next after five weeks of Easter*, to answer to the aforesaid *Samuel* of the plea, [and bill], aforesaid, and have you there, then, this writ: Witness Sir *Dudley Ryder*, knight, at *Westminster*, the 18th day of *April*, in the 28th year of our reign.

(e) By virtue of this writ, to me directed, I have taken the body of the within named *William Mills*, which I have ready, at the day, and place within contained, according as by this writ it is commanded me.

* If the process isailable, then this clause is introduced, which is called an *ac etiam*, the Latin of the two first words; And also.

(a) *Ac etiam* in debt.

(b) Sheriff's return, *non est inventus*.

(c) *Latitat*.

(d) *Ac etiam*.

(e) Sheriff's return, *cepi corpus*.

Writ

Writ of Quo minus in the Exchequer.

GEORGE the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith and so forth; to the sheriff of *Berkshire*, greeting: We command you, that you omit not, by reason of any liberty, of your county, but that you enter the same, and take *William Mills*, late of *B.* in the county of *Oxford*, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body, before the barons of our exchequer, at *Westminster*, on the *Morrow of the Holy Trinity*, to answer *Samuel Rickards*, our debtor, of a plea, that he render to him, 200*l.* which he owes him, and unjustly detains, whereby he is the less able to satisfy us the debts, which he owes us, at our said exchequer, as he saith, he can reasonably shew, that the same he ought to render, and have you there, then, this writ. Witneis, *Sir Thomas Parker*, knight at *Westminster*, the 6th day of *May*, in the 28th year of our reign.

(a) By virtue of this writ to me directed, I have taken the body of the within named *William Mills*, which I have ready, before the barons within written, according as within it is commanded me.

Special bail, on the arrest of the defendant, pursuant to the testatum capias, ante.

(b) KNOW all men by these presents, that we *William Mills* of *B.* in the county of *Oxford*, gentleman, *Peter Hammond* of *P.* in the said county, yeoman, and *Edward Thomlinson*, of *W.* in the said county, innholder, are held and firmly bound to *C. J. Esq.* sheriff of the county of *Berks*, in 400*l.* of lawful money of *Great Britain*, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made, we bind ourselves, and each of us, by himself, for the whole, and in gross, our, and every of our heirs, executors, and administrators, firmly by these presents; sealed with our seals, dated the 15th day of *May*, in the 28th year of the reign of our sovereign lord *George the Second*, by the grace of God, king of *Great Britain, France and Ireland*; defender of the faith, and so forth; and in the year of our Lord, one thousand, seven hundred, and fifty-five.

The condition of this obligation is such, that if the above bounden *William Mills*, do appear before the justices of our sovereign lord the king at *Westminster*, on the *Morrow of the*

[a] Sheriff's return, *cepi corpus.*

[b] Bail bond to the sheriff.

Holy

Holy Trinity, to answer *Samuel Rickards*, gentleman, of a plea of debt, of 200*l*. then this obligation shall be void, and of none effect, or else shall be, and remain, in full force and virtue.

Sealed and delivered,	<i>W. Mills</i> , (L. S.)
being first duly	<i>P. Hammond</i> (L. S.)
stamped, in the	<i>E. Thomlinson</i> (L. S.)
presence of	
<i>H. S.</i>	
<i>T. G.</i>	

(a) You, *William Mills*, do acknowledge, to owe unto the plaintiff, 400*l*. and you *Peter Hammond*, and *Edward Thomlinson*, do severally acknowledge to owe, unto the same person, the sum of two hundred pounds, a-piece, to be levied upon your several goods, and chattels, lands, and tenements; upon condition, that if the defendant be condemned in this action, he shall pay the the condemnation money, or render himself a prisoner, in the *Fleet* for the same; and if he fail so to do, you *Peter Hammond* and *Edward Thomlinson*, do undertake to do it for him.

Trinity term, 28 *George the Second*.

(b) *Berks* } On a *testatum capias*, against *William Mills*,
to wit. } late of *B.* in the county of *Oxford*, gentleman,
returnable on the *Morrow of the Holy Trinity*, at the suit of
Samuel Rickards, of a plea of debt, of two hundred pounds.

The bail are *Peter Hammond* of *P.* in the country of *Oxford*, yeoman, *Edward Thomlinson* of *W.* in the said county, innholder.

R. P. attorney for the defendant.

The party himself in 400*l*.

Each of the bail in 200*l*.

Taken and acknowledged the 28th day of *May*, in the year of our Lord, one thousand, seven hundred, and fifty-five, *de bene esse*, before me,

R. G. one of the commissioners, &c.

The Record as removed, by Writ of Error.

(c) The lord the king, hath given in charge to his trusty and well beloved Sir *John Willes*, knight, his writ, closed,

[a] Recognizance of bail bond before a commissioner.

[b] Bail piece.

[c] Writ of error

in

in these words, GEORGE the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to our trusty and well beloved Sir *John Willes, knight*, greeting: Because in the record, and process, and also in the giving of judgment, of the plaint, which was in our court, before you, and your fellows, our justices of the bench, by our writ, between *Samuel Rickards*, gentleman, and *W. Mills*, late of *B.* in the county of *Oxford*, gentleman, of a certain debt of two hundred pounds, which the said *Samuel* demands of the said *William*, manifest error hath intervened, to the great damage of him the said *Samuel*: as we, from his complaint are informed, we being willing, that the error, if any there be, should be corrected, in due manner, and that full, and speedy justice, should be done to the parties aforesaid, in this behalf, do command you, that if judgment thereof be given, then, under your seal, you do distinctly, and openly, send the record, and process, of the plaint aforesaid, with all things concerning them, and this writ, so that we may have them, *from the day of Easter in fifteen days*, wheresoever we shall then be in *England*, that the record and process aforesaid, being inspected, we may cause to be done thereupon, for correcting that error, what of right, and according to the law and custom of our realm of *England*, ought to be done. Witness ourself, at *Westminster*, the 12th day of *February*, in the 29th year of our reign.

(a) The record, and process, whereof in the said writ, mention is above made, follow in these words, to wit.

(b) Pleas at *Westminster*, before Sir *John Willes, knight*, and his brethren, justices of the bench, of the lord the king at *Westminster*, of the term of the *Holy Trinity*, in the 28th year of the reign of the lord *George the Second*, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, &c.

(c) *Oxon* } *W. Mills* late of *B.* in the county aforesaid to wit. } said, gentleman, was summoned to answer *Samuel Rickards*, of a plea, that he render unto him, two hundred pounds, which he owes him, and unjustly detains [as he saith] (d) And thereupon, the said *S.* by *T. G.* his attorney, complains that whereas, on the 1st day of *September*, in the year of our Lord one thousand seven hundred and fifty-

[a] Chief Justice's return.

[b] The record.

[c] Writ

[d] Declaration, or count of a bond.

four, at *B.* in the said county, the said *W.* by his writing obligatory, sealed with his seal, did acknowledge himself to be bound to the said *Samuel*, in the said sum of two hundred pounds, of lawful money of *Great Britain*, to be paid to the said *Samuel*, whenever the said *W.* should be required: Nevertheless, the said *W.* (although often required,) hath not paid to the said *Samuel*, the said sum of two hundred pounds, nor any part thereof, but hath hitherto altogether refused, and doth still refuse, to render the same; wherefore the said *Samuel* saith, that he is injured, and hath sustained damage to the value of ten pounds, and thereupon he brings his suit, [and good proof.] (a) And he brings here into court, the writing obligatory aforesaid, sealed with the seal of the said *William*, which testifies the debt aforesaid, in form aforesaid, the date whereof is the day and year in that behalf before mentioned. (b) And the aforesaid *W.* by *R. P.* his attorney, comes and defends the wrong and injury when, [and where it shall behove him] (c) and craves oyer of the said writing obligatory, and it is read unto him [in the form aforesaid] he likewise craves oyer of the condition of the said writing, and it is read unto him in these words, viz. The condition of this obligation is such, that if the above bounden *W. Mills*, his heirs, executors, and administrators, and every of them, do, and shall from time to time, and at all times hereafter, well and truly stand to, obey, observe, fulfil, and keep, the award, arbitrament, order, judgment, final end and determination, of *D. S.* of *W.* in the said county, clerk, and *H. B.* of *W.* aforesaid, gentleman, (arbitrators indifferently nominated, and chosen, by and between the said *W. Mills*, and the above named *Samuel Richards*, to arbitrate, award, order, judge, and determine, of all, and all manner of actions, cause or causes of action, suits, plaints, debts, duties, reckonings, accounts, controversies, trespasses, and demands whatsoever, had, moved, or depending, or which might have been had, moved, or depending, by and between the said parties, for any matter, cause or thing, from the beginning of the world, until the day of the date hereof,) which the said arbitrators shall make, and publish, of, or in the premises, in writing, under their hands and seals, or otherwise, by word of mouth, in the presence of two credible witnesses, on, or before the first day of *January*, next ensuing the date hereof, then this ob-

(a) *Proferet in curia.* (b) Defence. (c) Oyer prayed of the bond, and condition, to wit, to perform an award.

ligation to be void, and of none effect, or else to be and remain in full force and virtue. (a) Which being read and heard, the said *W.* prays leave to imparl therein, here, until the *Octave of the Holy Trinity*, and it is granted unto him; (b) the same day is given to the said *S. Rickards*, here, &c. At which day, to wit, on the *Octave of the Holy Trinity*, here, come as well the said *Samuel Rickards*, as the said *William Mills*, by their attornies aforesaid, and hereupon the said *Samuel* prays, that the said *William* may answer to his writ, and count aforesaid.

(c) And the said *W.* defends the wrong and injury, when, &c. And saith that he the said *Samuel* ought not to have, or to maintain, his said action thereof against him, because he saith, that the said *David Stiles*, and *Henry Bacon*, the arbitrators before named, in the said condition, did not make any award, arbitrament, order, judgment, final end, or determination, of, or in the premises, above specified, in the said condition, on or before the first day of *January*, in the condition aforesaid above mentioned, according to the form and effect of the said condition, and this he is ready to verify, wherefore he prays judgment, whether the said *Samuel* ought to have, or maintain his said action thereof against him [and that he may go thereof without a day.] (d) And the said *Samuel* saith that for any thing above alledged by the said *William*, he the said *S.* ought not to be barred from having and maintaining his said action thereof, against him, because he saith, that after the making the said writing obligatory, and before the said first day of *January*, to wit, on the 26th day of *December* in the year aforesaid, at *B.* aforesaid, in presence of two credible witnesses, namely, *J. D.* of *C.* in the county aforesaid, and *R. M.* of *W.* in the county of *B.* the said arbitrators undertook the charge of the award, arbitrament, order, judgment, final end, and determination aforesaid, of, and in the premises specified in the condition aforesaid, and then, and there made and published their award, by word of mouth, in manner and form following, that is to say, the said arbitrators, did award, order and adjudge, that he the said *William Mills*, should forthwith pay to the said *Samuel Rickards*, the sum of seventy-five pounds, and that thereupon all differences between them, at the time of the making the said writ-

(a) Imparlance. (b) Continuance. (c) Plea, no such award.
(d) Replication setting forth an award.

ting
J. D. of C. in the county aforesaid, and R. M. of W. in the county of B. the said arbitrators undertook the charge of the award, arbitrament, order, judgment, final end, and determination aforesaid, of, and in the premises specified in the condition aforesaid, and then, and there made and published their award, by word of mouth, in manner and form following, that is to say, the said arbitrators, did award, order and adjudge, that he the said William Mills, should forthwith pay to the said Samuel Rickards, the sum of seventy-five pounds, and that thereupon all differences between them, at the time of the making the said writ-

ting obligatory, should finally cease, and determine. And the said *Samuel* further saith, that although he, afterwards, to wit, on the 6th day of *January*, in the year of our Lord, one thousand seven hundred and fifty-five, at *Banbury* aforesaid, requested the said *William* to pay to him the said *S.* the said seventy-five pounds, (a) yet protesting, that the said *William* hath not stood to, obeyed, observed, fulfilled, or kept any part of the said award, which by him the said *W.* ought to have been stood to, obeyed, observed, fulfilled, and kept: Nevertheless, for replication in this behalf, he saith, that the said *W.* hath not hitherto paid to him the said *Samuel*, the said seventy-five pounds, or any part thereof, and this he is ready to verify, wherefore he prays judgment, and his debt aforesaid, together with his damages, occasioned by the detention of the same, to be adjudged unto him, &c. (b) [And the aforesaid *W.* saith, that the plea aforesaid, by him the said *Samuel* in manner and form aforesaid, above in reply pleaded, and the matter in the same contained, are not sufficient in law, for the said *Samuel* to have, or maintain, his action aforesaid thereof, against him the said *W.* to which replication, the said *W.* is not under any necessity, nor is he obliged by the law of the land, in any manner to answer, and this he is ready to verify; wherefore, for want of a sufficient replication in this behalf the said *W.* prays judgment, and that the said *S.* may be barred from having or maintaining his aforesaid action thereof against him, &c. (c). And the said *W.* according to the form of the statute in such case made, and provided, sets down and shews to the court here, the causes of demurrer following, to wit, that it doth not appear by the replication aforesaid, that the said arbitrators made the same award, in the presence of two credible witnesses, on, or before the first day of *January*, as they ought to have done, according to the form and effect of the condition aforesaid, and that the replication aforesaid, is uncertain, insufficient, and wants form. (d) And the said *S.* saith, that the plea aforesaid, by him in reply pleaded, and the matter therein contained, are good, and sufficient in law, for the said *Samuel*, to have and maintain the said action of him the said *Samuel*, against the said *William*, which said plea, and the matter therein contained, the said *Samuel* is ready to verify, and prove, as the court shall direct; and because the aforesaid

(a) *Protestando.*(b) *Demurrer.*(c) *Causes of demurrer*(d) *Joinder in demurrer,*

William hath not answered to that plea, so pleaded in reply, nor hath, in any manner denied the same, the said *Samuel*, prays judgment, and his debt aforesaid, together with his damages, occasioned by the detention of the same, to be adjudged to him, &c. (a) And because the justices here, will advise themselves, of, and upon the premises, before they give judgment thereon, a day is thereupon given, to the parties aforesaid, here, *until the Morrow of all Souls*, to hear their judgment thereon, for that the said justices, here, are not yet advised thereof: At which day, here, come as well the said *W.* as the said *S.* by their attornies, aforesaid, and because the said justices, here, will farther advise themselves, of, and upon the premises, before they give judgment thereon, a day is farther given, to the parties aforesaid, here, *until the Octave of St. Hilary*, to hear their judgment thereupon, for that the said justices, here, are not yet advised thereof; at which day, here, come as well the said *Samuel Rickards*, as the said *W. Mills*, by their attornies aforesaid. (b) Whereupon the record, and matters aforesaid, having been seen, and by the justices here, fully understood, and all and singular the premises, being examined, and mature deliberation being had thereupon, (c) for that it seems to the said justices, here, that the said plea of the said *Samuel Rickards*, by him in reply pleaded, and the matters therein contained, are not sufficient in law for him to have and maintain the said action of the said *Samuel*, against the said *William*. (d) Therefore it is considered that the aforesaid *Samuel* take nothing by his writ, but that he, be in mercy, for his false complaint, and that the aforesaid *W.* go thereof, without a day, &c. (e) And it is farther considered, that the aforesaid *W.* do recover against the aforesaid *S.* eleven pounds and seven shillings, for his costs and charges, by him, about his defence in this behalf sustained, adjudged by the court here to the said *W.* with his consent, according to the form of the statute in such case made and provided; (f) and the said *W.* may have execution thereof, &c.

(g) Afterwards, to wit, *on Wednesday next after fifteen days of Easter*, in this same term, before the lord the king, at *Westminster*, comes the aforesaid *Samuel Rickards*, by *P. M.* his attorney, and saith, that in the record and process aforesaid, and also in the giving of the judgment in the plea

(a) Continuances.

(b) Opinion of the court.

(c) Replication in sufficient Judgment for defendant.

(d) *Quarens nihil capiat, per breve.*

(e) Amercement, costs.

(f) Execution.

(g) General errors assigned.

aforesaid,

aforesaid, it is manifestly erroneous in this, to wit, that the judgment aforesaid, was given in form aforesaid, for the said *W. Mills*, against him the aforesaid *Samuel Rickards*, where by the law of the land, judgment should have been given, for him the said *Samuel Rickards*, against the said *W. Mills*, and this he is ready to verify. (a) [And the said *Samuel* prays the writ of our lord the king, to warn the said *W. Mills* to be before the lord the king, to hear the record and process aforesaid, and it is granted unto him, by which the sheriff aforesaid is commanded, that (by good and lawful men of his bailiwick) he give notice to the aforesaid *W. Mills*, that he be before the lord the king, *from the day of Easter in five weeks* wheresoever he shall then be in *England*, to hear the record, and process aforesaid, (if it shall have happened, that in the same, any error shall have intervened) and farther [to do and receive what the court of the lord the king shall consider in this behalf.] The same day is given to the said *S. Rickards*. (b) At which day, before the lord the king, at *Westminster*, comes the said *Samuel Rickards*, by his attorney aforesaid, and the sheriff returns, that by virtue of the writ aforesaid, to him directed, he had given notice to the said *W. Mills*, that he should be before the lord the king, at the time aforesaid, in the said writ contained, by *John Den*, and *Ricbard Fen*, good, &c. as by the same writ he was commanded, which said *W. Mills*, according to the warning given him in this behalf here cometh by *Thomas Webb* his attorney; (c) Whereupon the said *Samuel* saith, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, there is manifest error alledged the error aforesaid, by him in the form aforesaid alledged, and prays, that the judgment aforesaid, for the error aforesaid, and others in the record and process aforesaid, being, may be reversed, annulled, and held for nothing; and that the said *W.* may rejoin to the errors aforesaid; and that the court of the said lord the king, here, may proceed to the examination, as well of the record, and process aforesaid, as of the matter aforesaid, above for error assigned. (d) And the said *W.* saith, that neither in the record, nor process aforesaid, nor in the giving of the judgment aforesaid, in any thing, is error; and he prays in like manner, that the court of the said lord the king, here, may proceed to the examination, as well

(a) Writ of *scire facias* to hear errors.

(b) Sheriff's return, *scire feci*.

(c) Error assigned, *de novo*.

(d) Rejoinder, *in nullo est erratum*.

of the record, and process aforesaid; as of the matters aforesaid above, for error assigned. (a) And because the court of the lord the king, here, is not yet advised, what judgment to give, of and upon the premises; a day is therefore given, to the parties aforesaid, until *the Morrow of the Holy Trinity*, before the lord the king, wheresoever he shall then be in *England*, to hear the judgment of and upon the premises, for that the court of the lord the king, here, is not yet advised thereof: At which day, before the lord the king at *Westminster*, come the parties aforesaid, by their attorneys aforesaid; (b) Whereupon, as well the record, and process aforesaid, and the judgment thereupon given, as the matters aforesaid, by the said *Samuel* above for error assigned, being seen, and by the court of the lord the king, here, being fully understood, and mature deliberation, being thereupon had; for that it appears to the court of the lord the king, here, that in the record, and process aforesaid, and also in the giving of the judgment aforesaid, there, is manifest error. (c) Therefore it is considered, that the judgment aforesaid for the error aforesaid, and others in the record and process aforesaid, be reversed, annulled, and held for nothing: (d) and that the aforesaid *Samuel*, recover against the said *W.* his debt aforesaid, and also fifty pounds for his damages, which he hath sustained, as well on occasion of the detention of the said debt, as for his costs and charges which he hath expended, about his suit in this behalf, to the said *Samuel*, with his consent, by the court of the lord the king, here adjudged, (e) and that the said *W.* be in mercy, &c.

Process of Execution.

(f) **GEORGE** the Second, by the grace of God, of *Great Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: We command you, that you take *W. Mills*, late of *B.* in your county, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us, in *three weeks, from the day of the Holy Trinity*, wheresoever we shall then be in *England*, to satisfy *Samuel Rickards*, two hundred pounds debt, which the said *Samuel Rickards* hath lately recovered against him, in our court before us; and also fifty pounds which were adjudged in our said court before us, to the said *Samuel Rickards*, for his damages

(a) Continuance. (b) Opinion of the court. (c) Judgment of the Common Pleas reversed. (d) Judgment for Plaintiff. Costs. (e) Defendant amerced. (f) Writ of *capias ad satisfaciendum*.

which

which he hath sustained, as well by occasion of the detention of the said debt, as for his costs and charges, which he hath expended, about his suit in this behalf, whereof the said *W. Mills* is convicted, as it appears to us of record; and have you there, then, this writ. Witness Sir *Thomas Denison*, * knight, at *Westminster*, the 19th day of *June*, in the 29th year of our reign.

(a) By virtue of this writ to me directed, I have taken the body of the within named *W. Mills*, which I have ready, before the lord the king, at *Westminster*, at the day within written, as within it is commanded me.

(b) *GEORGE* the Second, by the grace of God, of *Great-Britain, France and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Oxfordshire*, greeting: We command you, that of the goods and chattels, within your bailiwick, of *W. Mills*, late of *B.* in your county, gentleman, you cause to be made two hundred pounds debt, which *Samuel Rickards*, lately, in our court, before us at *Westminster*, hath recovered against him; and also fifty pounds, which were adjudged in our court, before us to the said *Samuel*, for his damages which he hath sustained, as well by occasion of the detention of his said debt, as for his costs and charges which he hath expended about his suit in this behalf; whereof the said *W. Mills* is convicted, as it appears to us of record; and have that money before us, in three weeks from the day of the Holy Trinity, wheresoever we shall then be in *England*, to render to the said *Samuel*, for his debt and damages aforesaid, and have there, then this writ. Witness Sir *Thomas Denison*, knight, at *Westminster*, the 19th day of *June*, in the 29th year of our reign.

(c) By virtue of this writ, to me directed, I have caused to be made of the goods and chattels of the within written *W. Mills*, two hundred and fifty pounds, which I have ready, before the lord the king, at *Westminster*, at the day within written, as I am commanded.

The answer of *J. S. Sheriff*.

* The senior *puisne* judge, there not being any chief justice that term. (a) Sheriff's return, *cepi corpus*. (b) Writ of *fiere facias*. (c) Sheriff's return, *fiere feci*. The *fiere facias* issues, where the body is not taken.

N. B. The *fiere facias* cannot be sued forth, after the body is taken in execution.

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F I N I S.

[illegible][illegible]